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IN THE  
APPELLATE COURT  
FOURTH DISTRICT  
February Term, 1945

Term No. 4308

Agenda No. 2.

THE PEOPLE OF THE STATE OF  
ILLINOIS, Upon the relation of  
F. J. GROFF, CLAUD COLLINS,  
CHARLES KUYKENDALL, FRANK  
RAWLINSON and L. R. MEDOFF,  
Directors of Grayville Community  
High School District No. 182,

Original Plaintiffs-Appellants,

vs.

THE BOARD OF EDUCATION OF CROSS-  
VILLE COMMUNITY HIGH SCHOOL  
DISTRICT NO. 120, in the County  
of White and State of Illinois,

Original Defendant-Appellee.

326 I.A. 33

Appeal from the

Circuit Court of

White County,

Illinois.

BRISTOW, P. J.

This is a proceeding in quo warranto brought by The People of the State of Illinois upon the relation of the Directors of Grayville Community High School District No. 182, hereafter referred to as the Grayville District, against the Board of Education of Crossville Community High School District No. 120, hereafter referred to as the Crossville District, in regard to the right to exercise jurisdiction over certain tracts of land claimed by each of said Districts, to be legally included within its boundaries.

In People vs. The Board of Education, 383 Ill. 166, which cause was transferred to this Court, will be found a statement of facts, part of which we will not repeat.

On October 29, 1941, a petition was filed in the office of the County Superintendent of Schools of White County, Illinois, for the organization of the Grayville District.



On October 31, 1941, three parts bound together as one petition were filed in the office of the same Superintendent of Schools, asking that certain contiguous non-high school territory be detached from non-high school territory and be attached to said Crossville District.

The three parts of this petition filed, one describing nineteen sections of land, one two sections and one a small tract, were identical in wording except as to the description of the land. Each stated that "We, the undersigned, being a majority of the legal voters residing in the following territory, to-wit," then described the territory and then proceeded as follows: "And, also, we the undersigned, being a majority of the legal voters residing in Community High School District No. 120, \* \* \* \* do hereby petition you to detach the above described territory from said non-high school district and attach the same to said Crossville Community High School District No. 120, in said County of White and State of Illinois; that said described territory is compact and contiguous and is adjacent to said Community High School District No. 120." The signers to each petition were the majority of the legal voters in the described territory, and, following the three parts as attached together, were the signers of a majority of the legal voters in the entire Crossville District Territory.

One point relied upon by Appellants, is, that this document filed as one petition, failed to comply with the Statute in that it was three petitions and not "a petition".

At 9:27 A.M. on November 29, 1941, the County Superintendent of Schools of White County, complied with the statutory required procedure, and filed with the County Clerk of said county, a map of the described territory. It will thus appear that this was done within the thirty day limitation period. Appellees contend that the filing of this petition and map was an annexation of said land to the Crossville District.

The lands described in the petition to be annexed were



included within the lands described in said petition filed October 29, 1941, to establish the Grayville District. After the annexation petition was filed, and after November 10th following, the County Superintendent of Schools called an election on the Grayville petition, and set said election for November 29, 1941, to begin at one o'clock P. M. thereof. At this election the majority of the votes cast were in favor of establishing the Grayville District.

At the time in question, the statutory provision for detaching lands of a non-high school territory and attaching same to an existing Community High School District, did not require any vote on the question. To organize a community high school district on a petition filed for such purpose, a vote was required.

The chief point of dispute and contention in this case is whether, by virtue of Section 89b of the Illinois School Laws, the filing of a petition to organize the Grayville District, rendered inoperative the petition filed two days later for annexation.

The provisions of the Statute relied upon, quoted, argued and cited by counsel are Sections 89a, 89b, 89c, and 96a State Bar Stat. 1941, Chapter 122, entitled "Schools".

Section 89a contains the provision for the filing of a petition to establish a community high school. It provides for the calling of an election, form of ballot, for or against "The establishment of a community high school", and later the calling of an election of a board of education, and the organization of the board. Section 89c provides that when such petition is filed with the county superintendent of schools, that he and the Superintendent of Public Instruction shall study the territory of the proposed district, high schools needs and conditions, and the area adjacent, and if the Superintendent of Public Instruction finds the proposed district is not compact and contiguous, a notice is published, no election is held and no further proceedings are had.

Section 96a, which was enacted several years after Section





89a, and after Section 89b was amended, provides that when "a petition" is filed with the county superintendent of schools, signed by a majority of legal voters of non-high school territory, and also signed by a majority of the legal voters of an adjacent community high school district, to detach such compact and contiguous territory from the non-high school territory and to attach same to the adjacent high school district, that "said territory shall be detached from said non-high school district and added to said community or township high school district, and it shall be the duty of said county superintendent of schools, within thirty days after said petition is filed with him as aforesaid, to make and file with the county clerk of his county a map showing the new and added boundaries of said community or township high school district as requested in said petition, and from the filing of said map in the office of the county clerk as aforesaid said territory detached \* \* \* \* shall be a part and parcel of said community high school district."

Only recently, since the filing of briefs in this cause, our Supreme Court decided the case of *People ex rel. Simpson vs. Funkhouser et al* 385 Illinois 386. In our opinion this decision conclusively disposes of the issues of law involved in the instant case. It was there held that a proceeding under Section 89a takes precedence over one subsequently commenced under section 96a; that to hold otherwise produces confusion and chaos and arrogates to the county superintendent of schools extreme authority not contemplated by the legislature. Following this authority, we are compelled to hold that the Board of Education of Crossville Community No. 120 is without any authority to exercise jurisdiction over the tracts of land in dispute and that the Grayville Community High School District No. 182 is a valid and duly organized high school district.

Accordingly, this cause is reversed and remanded with



directions that judgment be entered ousting the Board of Education of the Crossville District from its purported jurisdiction over the territory in controversy.

REVERSED AND REMANDED

Abstract.

FILED

APR 25 1945

*Stanley B. Brown*

CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS



43338

HARRY DANISON,  
Appellee,

v.

DOROTHY BROSMORE,  
Appellant.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

326 I.A. 341

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant Dorothy Brosmore appeals from a judgment in the sum of \$2,405 entered against her in an action on a promissory note dated August 5, 1939 for the principal sum of \$1,940, payable 2 years after date with interest at 6 per cent, signed by herself, Rudolph H. Bendler and Charles Bendler, his father.

Defendant denied the execution of the note, and upon the trial, at the close of plaintiff's evidence, amended her answer by adding the defense of want of consideration. No reply was filed to this amendment, but defendant offered testimony in support of the defense and is therefore held to have waived the reply. Cairo Lumber Co., Inc. v. Ladenberger, 313 Ill. App. 1, 12.

Evidence offered on behalf of the plaintiff shows that plaintiff and Rudolph Bendler were lifelong friends; that in July of 1939 Rudolph, with defendant, to whom he was then engaged, went to plaintiff's home and requested a loan of \$2,500 from plaintiff; that defendant offered to sign the note with Rudolph, it being the intention of the parties to use the money in the purchase of a home; that plaintiff told Rudolph he would let him have whatever money he had in the bank; that on August 5th plaintiff met Rudolph and Charles Bendler at the latter's place of employment and gave Rudolph \$1,940, receiving the note sued upon which was then signed by Charles and Rudolph Bendler, with the





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understanding that it was to be later signed by defendant; that defendant and Rudolph bought the property, taking title in joint tenancy under a deed dated August 12, 1939, and were later married; that at a dinner given at their home sometime in the fall of 1939 (the exact date being in dispute), plaintiff, defendant, Rudolph and Charles Bendler retired to a bedroom where plaintiff produced the note for defendant's signature; that after discussion, arising from her inquiry as to whether she should sign the note in her married name or use her name of August 5th, the date of the note, she signed as Dorothy Brosmore, apologized for the delay in affixing her signature, and returned the note to plaintiff. Nothing was ever paid on account of the note. On July 7, 1943 defendant testified in a divorce proceeding brought by her against her husband in Cook county and a decree was subsequently entered, defendant waiving alimony and solicitor's fees. Litigation is now pending in the Circuit court of Cook county in respect to the property purchased in 1939. July 27, 1943 action on the note was commenced and service of summons had on defendant and Charles Bendler. The latter filed no answer and was called as a witness by plaintiff.

Defendant denies having been at the home of plaintiff prior to her marriage with Rudolph; that any conversation was ever had with respect to a loan or any promise made by her to sign a note. She denies that she received any part of the consideration of the note and says that the cash payment of \$2,000 made when the property was purchased was insurance money received by her on the death of her former husband and taken from the safety deposit box of her mother in the Continental bank on Saturday, August 5 or 12, 1939. She denies signing the note or having had any conversation with plaintiff regarding it. Her specific denial of the transaction alleged to have occurred in the home of plaintiff at the time of the dinner party is supported in part by the testimony







3.

of her mother, sister, brother and a friend.

Plaintiff offered the testimony of a handwriting expert who, after comparison of defendant's alleged signature on the note with a number of signatures admitted to be genuine, testified that the signature on the note was, in his opinion, written by the defendant. Defendant, assuming the role of a handwriting expert, pointed out certain alleged variations between the signature on the note and the genuine signatures and testified that she never signed her name as it appeared on the note. The questioned signature and those admitted to be genuine were submitted to the jury. There are various facts and circumstances in the record tending to impair the credibility of some of the witnesses offered by plaintiff and defendant, including themselves. The credibility of the witnesses and the weight to be given the testimony of each were primarily matters to be determined by the jury. Their finding has been approved by the trial court and we cannot say that it is against the manifest weight of the evidence. Therefore, we cannot disturb it. Carroll v. Krause, 295 Ill. App. 552, 565.

The jury has accepted plaintiff's version of the transaction, that \$1,940 was delivered to Rudolph Bendler and the note of himself and father taken with the understanding that defendant would also sign the note as she had formerly agreed. No further consideration was needed to support the signature of defendant, affixed to the note several months later. Commercial State Bank of Forreston v. Folker, 200 Ill. App. 385, 389; Cook v. Parker, 71 P.2d (Cal.) 591, 593. Defendant complains that the adding of Charles Bendler, as the maker of the note, created an obligation different from that alleged to have been entered into by herself and Rudolph and plaintiff at the latter's home before any money was paid. Having signed the note without objection to the

of his father, mother, brother and a friend.

Examination of the handwriting of the defendant's

signature, which was written on the

note with a number of signatures attached to it, showed

that the signature on the note was, in his opinion, written by

the defendant. Defendant, assuming the role of a handwriting

expert, pointed out certain alleged variations between the signa-

ture on the note and the genuine signature and testified that

the note signed by him as it appeared on the note. The

question of signature and the fact that it is a note signed by

him to the jury. There was no other testimony

in the record tending to impeach the credibility of some of the

witnesses offered by plaintiff and defendant, including them-

selves. The credibility of the witnesses and the value of the

evidence of each was left to the jury. It was to be deter-

mined by the jury. This finding was not supported by the trial

evidence and we cannot say that it is against the weight of

the evidence. Therefore, we reverse the judgment of the

trial court. Reversed.

The jury was instructed that the value of the evidence

that the note was signed by the defendant was to be determined

by the jury. The jury was also instructed that the

value of the note was to be determined by the jury. The

question of signature was to be determined by the jury.

It was also instructed that the value of the note was to be

determined by the jury. The jury was also instructed that

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the value of the note was to be determined by the jury.

It was also instructed that the value of the note was to be

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signature of Charles Bendler thereon, she cannot now object.  
The alleged variance urged by defendant is without merit.

The judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.



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43350

MICHAEL BRAUN and GLENEMAY BRAUN,  
Appellants,

v.

JULIA MANASTER,  
Appellee.

APPEAL FROM

CIRCUIT COURT,  
COOK COUNTY.

226 I.A. 34

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiffs sued, filing a complaint designated "assumpsit". Defendant moved to strike the complaint and dismiss the action. The motion to strike was sustained. Plaintiffs did not ask leave to file an amended complaint. The action was dismissed with judgment, and plaintiffs appeal.

The question to be determined is whether the complaint stated a cause of action. The complaint does not conform to the requirements of an action in assumpsit at common law. That was not necessary. The Civil Practice Act (Smith Hurd Anno. Stat., Chap. 110) with rules of the Supreme Court, made pursuant thereto, are controlling. Section 33 (1), par. 157, provides:

"All pleadings shall contain a plain and concise statement of the pleader's cause of action, counterclaim, defense or reply."

Subsection (3) of the section provides that pleadings shall be construed liberally "with a view to doing substantial justice between the parties".

We have considered this pleading in a conformity with this rule. It is neither plain nor concise. We hold it does not state a cause of action on any theory.

The facts we gather from the complaint are that on June 25, 1942, plaintiffs subleased from defendant a building of six

MICHAEL BROWN AND BERNARD BROWN,  
Appellants,

JULIA BROWN,  
Appellee.

CIRCUIT COURT,  
JULIA BROWN,

IN RE: JUDICIAL EVIDENCE DELIVERED TO THE COURT OF THE COURT,

The court's duty, being a complaint designated  
"assault". Defendant moved to dismiss the complaint and dis-  
miss the action. The motion to strike was sustained. Plaintiff  
did not file an answer to the complaint. The action was  
dismissed with judgment, and plaintiff's appeal.  
The question to be determined is whether the complaint  
states a cause of action. The complaint does not conform to the  
requirements of an action in assumpsit at common law. That was  
not necessary. The Civil Practice Act (which had been amended  
Chapter 116) with regard to the Supreme Court, made no change  
and controlling. Section 33 (1), par. 135, provides:

"All pleadings shall contain a plain and concise  
statement of the plaintiff's cause of action,  
counterclaim, defense or reply."

Subsection (b) of the section provides that pleadings shall  
be construed liberally "with a view to doing substantial justice  
between the parties."  
We have considered this pleading in a conformity with this  
rule. It is neither plain nor concise. We hold it does not state  
a cause of action on any theory.  
The facts as set forth from the complaint are that on June  
25, 1945, plaintiff suffered from defendant a beating of six



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furnished apartments to be used as a rooming house. They also purchased from the former tenant a business of that kind conducted there. Defendant knew and plaintiffs say they did not know the building was badly in need of repairs. Plaintiffs say they inquired of defendant about the physical condition of the building and that it was the duty of defendant to tell them the truth; that defendant did not tell plaintiffs the truth, "but defendant desiring the building reconstructed at plaintiffs' expense, and intending, contriving to wrongfully, maliciously cheat and defraud plaintiffs, advised plaintiffs the building in good repair, well knowing statement false and building not in good repair". Plaintiffs, however, say they made a casual inspection "which did not disclose inner timbers of structure supporting windows under rear porches honeycombed with rot, shaky and deteriorated". Plaintiffs, relying and trusting defendant, purchased furnishings and business of former tenant, "invested life savings and entered into a lease with defendant, agreeing to pay her \$225.00 month, for term expiring June 30th, 1945".

The complaint goes on to state: "At execution of lease and purchase of business of former tenant, the rear porches of building enclosed with glass and occupied by tenants in late spring, summer and early fall for sleeping --- in winter for storage." The pleading continues: "September 1st, 1943, defendant served demand that plaintiffs rebuild porches, a portion of building stated in good condition. Rebuilding of porches glassed in, extensive alteration, not a repair. Plaintiffs offered to pay a portion but offer refused. September 15th, 1943, defendant entered premises, removed glassed in porches, and erected open porches, not serviceable for sleeping or storage and increased cost of heating by lack of protection from cold and charged cost to plaintiffs' account."

furnished apartment to be used as a rooming house. They also  
purposes of from the former tenant a business of what kind conducted  
there. Defendant knew and Plaintiff say they did not know the  
building was badly in need of repairs. Plaintiff say they inspected  
of defendant about the physical condition of the building and that  
it was the duty of defendant to tell them the truth; that defendant  
did not tell Plaintiff the truth, but defendant desired the  
building reconstructed at Plaintiff's expense, and intending, con-  
triving to wrongfully, maliciously, fraudulently and defraud Plaintiff,  
advised Plaintiff the building in good repair, well keeping  
statement false and building not in good repair". Plaintiff,  
however, say they made a casual inspection "which did not disclose  
inner structure of structure supporting floors under rear porch  
non-combusted with rot, decay and deteriorated". Plaintiff say  
and trusting defendant, purchased furniture and business of former  
tenant, "invested life savings and entered into a lease with  
defendant, agreeing to pay her \$25.00 month, for two years  
June 30th, 1945".  
The complaint goes on to state: "At execution of lease  
and purchase of business of former tenant, the rear porch of  
building enclosed with glass and occupied by tenants in late  
spring, summer and early fall for sleeping -- in winter for storage".  
The pleading continues: "September 1st, 1943, defendant moved  
demand that Plaintiff rebuild porch, a portion of building erected  
in good condition. Rebuilding of porch placed in, extensive  
alteration, not a repair. Plaintiff offered to pay a portion for  
other repairs. September 1st, 1943, defendant entered porch,  
removed glass in porch, and erected open porch, not service-  
able for sleeping or storage and increased cost of heating by lack  
of protection from cold and charged cost to Plaintiff's account."



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The complaint also says: "At execution of purchase of leasehold, plaintiffs agreed to pay defendant \$225.00 monthly rental and deposited \$750.00 guaranty payment of rent. Defendant knew by wrongful acts plaintiffs' earnings substantially reduced but wrongfully evicted plaintiffs for failure rebuild potches, retaining deposit received from plaintiffs. Plaintiffs damaged in loss rentals, \$450.00, deposit, \$750.00, loss of profits, \$2500." The pleader does not state the total amount of his demand, which a computation shows to be the sum of \$3700.00.

It is manifest from this pleading that a lease of some kind was executed; that plaintiffs went into possession of the premises; that defendant put them out, whether for legal cause does not appear.

Plaintiffs were in possession for fifteen months and the rent due for this occupancy under the agreement would amount to \$3,375.00. Whether any part of it was paid during that time is not stated. For aught we can tell from this pleading, the amount deposited was insufficient to pay the rent due and unpaid.

Plaintiffs say they lost \$450.00 "rentals". What rentals, from whom due and for what time of occupancy, the pleading leaved us to guess. This comes a long way from being clear and concise pleading.

Plaintiffs also ask \$2500.00 for loss of profits. Again we are left to conjecture. Certainly this cannot be supposed to be any action in the nature of common law assumpsit. Apparently the pleader did not have assumpsit in his mind at all.

It seems more probable plaintiffs intended to state a cause of action for fraud and deceit. If so, from this standpoint, also, the pleading is inadequate. It is insufficient to allege fraud and deceit as mere conclusions. This is elementary. In order to state a cause of action for fraud and deceit the specific acts or facts must be stated from which the fraud appears. Carroll v.

3.

The complaint also says: "At expiration of purchase of leasehold, plaintiff agreed to pay defendant \$175.00 monthly rental and defendant agreed to pay plaintiff \$750.00 monthly payment of rent. Defendant has by wrongful sale of plaintiff's earnings substantially reduced but wrongfully evicted plaintiff for failure to build patches, retaining deposit received from plaintiff. Plaintiff's losses in lost rentals, \$450.00, deposit, \$750.00, loss of profits, \$250.00. The plaintiff does not state the total amount of his demand, which a computation shows to be the sum of \$2500.00.

It is manifest from this pleading that a lease of some kind was executed; that plaintiff set into possession of the premises; that defendant put them out, whether for legal cause does not appear.

Plaintiff was in possession for fifteen months and the rent due for this occupancy under the agreement would amount to \$2,250.00. Whether any part of it was paid during that time is not stated. For aught we can tell from this pleading, the amount deposited was insufficient to pay the rent due and unpaid.

Plaintiff says that lost \$450.00 "rentals". Was rentals from whom and for what time of occupancy, the pleading leaves us to guess. This case is long way from being clear and concise pleading.

Plaintiff also asks \$250.00 for loss of profits. Again we are left to conjecture. Certainly this cannot be supposed to be any action in the nature of common law assumpsit. Apparently the plaintiff did not have assumpsit in his mind at all.

It seems more probable plaintiff intended to state a cause of action for fraud and deceit. If so, from this standpoint, also, the pleading is inadequate. It is insufficient to allege fraud and deceit were considerations. This is elementary. In order to state a cause of action for fraud and deceit the specific acts or facts must be stated from which the fraud, deceit, Garrett v.



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Hastings, 259 Ill. App. 564; Ravlin v. C. A. & DeKalb R. R. Co., 297 Ill. 130; Davis v. Wirth, 249 Ill. App. 544.

Plaintiffs, however, say the trial judge did not consider their right to waive the tort and sue in assumpsit. They cite Arnold v. Dodson, 272 Ill. 377. Manifestly, plaintiffs could not waive an action they failed to state at all. Arnold v. Dodson does not help them. The opinion in that case holds that a party defrauded by a contract may rescind the contract and sue in assumpsit. Plaintiffs here do not state a case on that theory. They do not allege a rescission of the contract. On the contrary, they allege they entered into possession of the premises and held them for fifteen months. They did not return any consideration. They kept everything received. On no theory suggested can it be held that this pleading states a cause of action of any kind, whether contract, express or implied, or in tort.

The judgment will be affirmed.

AFFIRMED.

Niemeyer, P. J., and O'Connor, J., concur.



MARY COIT, Administratrix of the  
Estate of Edlyn Coit, Deceased,  
Appellee,

v.

ALBERT ORMEROD, THOMAS ORMEROD,  
CHECKER TAXI COMPANY, a Corporation,  
and CLEMENT BELINSKI,  
Defendants.

CHECKER TAXI COMPANY, a Corporation,  
and CLEMENT BELINSKI,  
Appellants.

APPEAL FROM  
SUPERIOR COURT  
COOK COUNTY.

326 I.A. 351

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Mary Coit, administratrix of the estate of Edlyn Coit, deceased, her four year old daughter, brought an action under the statute against Albert Ormerod, Thomas Ormerod, Checker Taxi Company, a corporation and Clement Belinski to recover for the wrongful death of her daughter. There was a jury trial and a verdict for \$10,000 in plaintiff's favor against all defendants. Afterward plaintiff entered a remittitur of \$2,500, judgment was entered on the verdict for \$7,500 and the Checker Taxi Cab Company and Clement Belinski, driver of the taxi cab appeal.

The record discloses that about 6:30 P. M. June 25, 1941, Belinski, who had a passenger in his taxi cab, was driving west in Dakin street which is one block south of Irving Park Boulevard, after having driven south in Laramie street. The destination of the passenger was 5525 West Dakin street, on the south side of the street. Defendant, Thomas Ormerod, a boy a few months over 15 years of age, was driving the automobile of his father, on an errand for the father, Albert Ormerod, from 50 to 100 feet behind the taxi cab in Dakin street, having also driven south in Laramie street and turned west. His little brother, 7 years old, was sitting by his side. The taxi cab was driven about 15 miles per hour and just before





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It reached the home of the Coits where the driver was to deliver his passenger, he turned to the south side of the street and stopped his cab headed more or less toward the southwest, although the evidence on this point varies somewhat. As he started to turn towards the south, the Omered boy turned towards the north to avoid hitting the rear end of the cab or at least to be sure that the automobile would not strike it. As he did so the little Coit girl, Edlyn, who had been playing with the Lyons children at their home which was located on the north side of the street at 5228 Dakin street, trotted out to cross the street when she was struck by the right front part of the Omered automobile, as a result of which she died. The day was bright and clear, the pavement dry and in good condition. Douglas' residences were on each side of the street. The evidence is conflicting as to whether the width of the paved roadway was 25 or 30 feet. There were pathways on each side of the street between the curb and the sidewalk and the houses were built considerably back from the sidewalk. Photographs of the place are in the record and show small bushes and some trees along each side of the street.

The jury were instructed that no recovery could be had unless they found from the evidence that the next of kin of the deceased child was in the exercise of due care at and before the time of the accident.

Counsel for the appealing defendants contend that there is no evidence tending to support the charge that the taxi cab was operated negligently; or if there was any negligence in that respect, it was not the proximate cause of the accident, and therefore the court should have directed a verdict at the close of all the evidence, as requested, or afterward should have sustained their motion for judgment notwithstanding the verdict. And the evidence is discussed in detail, which counsel say sustains their





contention.

Since we have concluded the judgment must be reversed and the cause remanded we will not discuss the evidence in detail for we are of opinion there was some evidence to the effect that the taxi driver, when he turned toward the south to the place where his passenger was to be taken, had something to do with the boy turning the automobile toward the north to avoid hitting the rear end of the cab. There is some further evidence which would indicate there was some negligence in the operation of the taxi cab which contributed to the accident, which under the rule of law, would prevent the court from directing a verdict.

Defendants further contend that the court erred in giving an instruction at plaintiff's request by which the jury were told that: "there was in full force and effect in the City of Chicago on June 25, 1941, a City Ordinance which provided and provides that:

"Except when necessary in obedience to traffic regulations or official traffic sign or signals, the operator of a vehicle shall not stand or park such vehicle in a roadway other than parallel with the edge of the roadway, headed in the direction of traffic, and with the curb-side wheels of the vehicle within twelve inches of the edge of the roadway." And it is argued that this ordinance had no application to the facts in the case at bar. We think it obvious this contention must be sustained. The taxi driver was not parking his car in the sense used in the ordinance but merely pulled to the left side of the street so that his passenger might alight and he receive his fare. Upon a consideration of all the evidence we are of opinion that this instruction was prejudicial and for that reason, the judgment must be reversed and the cause remanded.

Defendants further contend that the court erred in failing to give 3 instructions requested by them. We think the substance of each of the instructions was covered by other instructions and



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were little more than a papilloma and therefore the court did not  
err in refusing them.

For the reasons stated, the judgment of the Superior Court  
of Cook County is reversed and the issues remanded.

REVERSED AND REMANDED.

Wiemeyer, P. J., and Mathews, J., concur.





43310

L. A. DUBSKY,  
Appellee,  
v.  
CHARLES STERN,  
Appellant.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

326 I.A. 36

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of forcible detainer against defendant to recover possession of an apartment on the first floor of a building located at 2227 South Ridgeway avenue, Chicago. There was a hearing before the court without a jury, a finding and judgment in plaintiff's favor and defendant appeals.

The suit was commenced July 7, 1944 and the summons returnable July 17; a pluries summons returnable September 5, 1944, was served on defendant on September 2. September 13, defendant's appearance was entered by his counsel and on the same day they filed a verified motion that the cause be continued until September 19, on the ground that the wife of plaintiff was subpoenaed to appear as a witness but refused to do so; that she lived with her husband and family at Fox River Grove, Illinois, where they had resided more than 20 years and that neither she nor her husband had any intention of moving from their home; that it was sought to have her brought before the court or that defendant be given an opportunity to take her deposition. The motion, supported by an affidavit of Albert Schwartz, the authorized agent of defendant, further set up that defendant, who was a material witness, was absent from the jurisdiction of the court and would not return until September 19, 1944, and further, that the affiant believes that defendant, if present, would testify that he rented

15810

L. A. ...  
v.  
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... on the first  
... at 117 South Ridgeway Avenue, Chicago.  
... a finding  
... and judgment in plaintiff's favor and defendant's expense.

The suit was entered July 5, 1944 and the summons returned

while July 17; a divisor was one responsible defendant, 1944, was

entered on defendant on September 2, defendant's

appearance was entered by his counsel and on the same day filed

a verified motion that the cause be continued until September 19,

on the ground that the wife of defendant was summoned to appear

as a witness but refused to do so; that she lived with her husband

and his family at 144 River Grove, Illinois, where they had

resided more than 20 years and that neither she nor her husband

had any intention of moving from their home; that it was impossible

to have her brought before the court or that defendant be given

an opportunity to take her deposition. The motion, supported

by an affidavit of Albert Schwartz, the authorized agent of defendant,

was granted, and the cause continued, who was a material witness

and, was absent from the jurisdiction of the court and could not

appear until September 19, 1944, and therefore, that the motion

relieves that defendant, if present, would testify that he refused



~~2.~~ <sup>three</sup>  
the apartment in question 3 years prior, to provide a home for Mallika Orosi, who was the companion for many years, of defendant's mother before her death, and her devoted friend; that between January 1, 1944 and May 1, 1944, defendant had numerous conversations with James J. Dvorak, who purported to be plaintiff's agent, in which conversations Dvorak indicated that he disliked the occupants of the apartment because of their alleged personal habits, in failing to keep the premises clean, and for these reasons he wanted the occupants to vacate the apartment; that in none of these conversations was it stated that the apartment was desired by plaintiff for occupancy. The affidavit further set up that plaintiff's counsel had no opportunity to confer with defendant in connection with the preparation of the affidavit and therefore was unable to furnish dates, or the exact context of the conversations.

So far as the record discloses, the motion was not passed upon but the trial went to hearing on September 13. In response to a question by the court as to whether defendant was ready he replied: "if these affidavits are admitted, we are ready today." Counsel for plaintiff then said that for the purpose of the hearing plaintiff would admit that if Stern were present he would testify to the matters mentioned in the affidavit.

The record discloses that on May 5, 1942, plaintiff, "per James J. Dvorak, Agent," entered into a written lease with defendant "Charles Stern of 151 E. Chicago Ave. Chicago" whereby the apartment was rented for the period commencing May 1, 1942, and ending April 30, 1943, at a rental of \$60 per month, payable in advance. One of the blank spaces of the lease was filled in by typing the following: "It is further understood and agreed that the premises herein noted shall be occupied by four adult women and one child, namely, Mrs. Bessie Kosman, Louise Kosman, Marika Orosi, Gertrude Pankes and daughter Mary Louise, and no other;"





32  
and further, that the rent should be paid directly to the lessor or his agent, by the lessee.

February 18, 1944, plaintiff's agent, who was also his son-in-law, and lived next door to the premises in question, wrote defendant a letter in which it was stated: "This is to advise you that the owner of the building located at 2227 S. Ridgeway Ave. in which you have leased the first flat, wishes to occupy the flat on May 1st., 1944;" and asking that the apartment be vacated by April 30th, 1944. February 24, defendant wrote Mr. Dvorak, the agent, from "151 East Chicago Avenue" saying: "This is to advise you that I am ready, desirous and able to sign a lease for the first apartment, 2227 South Ridgway Avenue, Chicago, for the year commencing May 1, 1944, on the same terms as the current year.

"I cannot recognize your notice dated February 18, 1944, because it is not in compliance with the O.P.A. Maximum Rent Regulation." April 6, 1944, Dvorak wrote a letter addressed to defendant at "151 E. Chicago Ave." in which he stated: "On February 18th you were notified as follows:" Then follows a copy of the letter of February 18, above mentioned, and the letter continues: "Further, please be advised that this notice is in accordance with the O.P.A. rent regulation, a copy of which is being sent to the Office of Price Administration for the Chicago Area." Written on the bottom of this letter appears "Note <sup>sm</sup> -- This is a copy of second notice sent to Chas. Stern, signer of lease for the year 1942 <sup>fn</sup> -- no lease was signed for the year 1943."

Wilmetta Spier, called by plaintiff, testified that she was employed as stenographer for plaintiff's counsel, that May 31, 1944, she went to 151 East Chicago avenue and there saw Miss Krapock at the Cinema Theater and asked for Mr. Stern, the defendant, and was told he was not in; that she then left a copy of a notice with Miss Krapock. The notice was addressed to defendant at 151 East Chicago avenue, and signed by plaintiff, by his agent,





4.  
Mr. Dvorak, and by plaintiff's counsel. It was in the usual printed form and stated that plaintiff had elected to terminate your tenancy of the apartment in question. The following was typed in a blank space: "Apartment No. One (1) on the First floor of the building located at 2227 So. Ridgeway Ave., Chicago, Illinois. 1. The owner wishes to occupy the flat. 2. On termination of lease, occupants were subtenants; no part of premises used by tenant as his own dwelling;" that the termination would take effect on the 30th of June, 1944, and defendant will be required to deliver up possession on that date.

James J. Dvorak who signed the lease on behalf of plaintiff testified that he sent the letter of February 18th to Mr. Stern by registered mail at the only address he knew, 151 East Chicago avenue; that he had also sent the letter of April 6th to Mr. Stern at the same address. He further testified that plaintiff and his wife, Mrs. Dubsky, were his father and mother-in-law, and lived at Fox River Grove, Ill.; that they owned the building in which the apartment was located and that he was their agent. That both of them were in the 70's and in poor health; that the daughter, who lived with the parents was not well, and there was no doctor in Fox River Grove; that he had but one conversation with plaintiff between January 1, 1944 and May 1, 1944, which was in the hallway of the building 2227 So. Ridgeway; that Mrs. Dvorak was present; that Mr. Stern said he intended to stay and would not move; that he offered the witness more rent; that Stern asked him if the people could not stay in the apartment and the witness said: "no, the folks wanted the apartment." That he never complained of the character of the persons living in the apartment or the condition in which it was kept, and that he had not been in the apartment.

Some of this evidence was objected to by counsel for defendant as immaterial and that plaintiff and his wife and daughter were available and could appear as witnesses; that the witnesses





5.  
should not be allowed to testify as to their frame of mind; and that the health of plaintiff and his wife and daughter was very poor.

Mrs. Dvorak, called by plaintiff, testified that she lived with her husband at 2225 So. Ridgeway avenue and that plaintiff was her father; that her mother was suffering from a heart and kidney affliction; that her father was senile and not very responsible; that the mother was able to get around at home but was not able to climb stairs very well and that she wanted them near her in the apartment in question, so as to help take care of them.

Henry Stern, defendant's brother, testified that defendant had ceased to be manager of the theater on Chicago avenue 3 or 4 years ago and had ceased business on account of a severe heart attack. That the witness was manager of the theater and president of the corporation which operated it. That he did not recall Miss Krapock because they had so many different people working for them; that she may have been cashier for a short time; that he did not recall her name; but if she was there she was employed by the witness; that his brother Charles, the defendant, comes into the office of the theater at 151 East Chicago avenue at no regular time; had no official connection with it; that he would drop in occasionally to see a picture or to have lunch.

On cross-examination he testified that he did not think his brother had a telephone listed in the directory under his own name and did not have an office at the theater; no headquarters there; that "He is not associated with us," but formerly had been; "he doesn't get any official mail there any more, because he is not there. Some letters come to him from people who know he was associated there at one time."

FI Earl Danenburg, called by defendant, testified that about April 22, 1944, which was Saturday, he had a conversation with Mrs. Dubsky at her home in Fox River Grove, having been sent





there by his employer, Mr. Albers, who operated a private detective agency. It was about noon; that he was in the kitchen where Mrs. Dubsky was getting the meal. She said she was Mrs. Dubsky and had lived there for about 18 or 20 years and that they were not going to move; that that was her home; that defendant employed the agency to make the investigation. On cross-examination he testified that he did not ask her whether she wanted to rent her home; she said it was not for sale. That he afterward talked to Mr. Novak, a real estate man in Fox River Grove, who told him he had no knowledge that the Dubskys were intending to move.

Mrs. Gertrude Pankes, one of the persons for whom the apartment was rented, as mentioned in the lease, testified that the apartment was rented for her mother, herself, her sister, her little daughter, and Mallika Orosi, an elderly lady who had been housekeeper for defendant's mother for 45 years; that the witness was to take care of Mallika Orosi for the exact amount of the rent; that Mallika Orosi was in ill health; that the first of September, as she was leaving the apartment for work she met Mrs. Dvorak who asked her when they were going to get out of the apartment and asked the witness if Mr. Stern didn't tell them they were to be out of the flat; they were supposed to move; that she replied: "I know you told us in May you wanted us to move and I have been trying to get another place. There is nothing to be had and Mr. Stern even put an ad in the west side newspaper," for an apartment; that she had not been able to get in touch with defendant because he had been very sick; that Mrs. Dvorak said: "You are supposed to be out by October 1st, because we are going in October 1st."

The court then indicated he was going to decide for plaintiff but on account of the absence of defendant (who would not be available to give the necessary bond for appeal until he returned

There is no evidence, Mr. [redacted], that the defendant was in the vicinity of the [redacted] on the night of the murder. The only evidence that the defendant was in the vicinity of the [redacted] on the night of the murder is the fact that the defendant was in the vicinity of the [redacted] on the night of the murder. The only evidence that the defendant was in the vicinity of the [redacted] on the night of the murder is the fact that the defendant was in the vicinity of the [redacted] on the night of the murder.



7.  
September 19) the matter was continued until that date when judgment for possession was entered in plaintiff's favor.

It is conceded by counsel for both parties that under the regulations of the Office of Price Administration, under the facts disclosed by the evidence, plaintiff was not entitled to maintain this action unless he was to occupy the premises for himself and his family.

~~(Plaintiff)~~ Counsel for defendant contend that the evidence is insufficient to show that plaintiff and his family, in good faith, intended to occupy the apartment and further, that the notice of May 31, from which we have above quoted, was not served on the defendant, Stern, but was left with Miss Krapock at the theater building at 151 East Chicago avenue when Stern was no longer connected with the theater and for some time prior thereto had not been connected with it and had no office at this place; while on the other side, counsel for plaintiff says that the service of the notice was sufficient, and among other things points to the fact that on February 24, 1944, Stern wrote the letter from 151 East Chicago avenue to Mr. Dvorak, which is evidence that he was located at the premises at that time. But the difficulty with this contention is that the 30 day notice of May 31, was not served for nearly 3 months after the letter of February 24. The evidence without contradiction shows that Stern was in a bad state of health and had not been connected with the theater for some time, except to drop around there occasionally. We think the evidence of the service of the notice was insufficient and we are further of opinion that the evidence as to whether plaintiff and his family intended to occupy the apartment is also insufficient, Ryerson v. Bankers' Life Ass'n, 183 Ill. App. 194, and cases there cited: California, etc. Co. v. Union, etc. Co., 126 Calif. 433; and that the finding of the court to the contrary is against the

12

...the subject was continued until last day when  
judgment for possession was entered in Plaintiff's favor.  
It is contended by counsel for both parties that under the  
regulations of the Office of Police Administration, under the  
lack of interest of the witnesses, Plaintiff was not entitled to  
maintain this action unless he was to comply the provisions for Plaintiff  
and his family.  
...for defendant contends that the evidence is insufficient  
to show that Plaintiff was the family, in good faith, intent-  
ed to comply the agreement and further, that the notice of his  
31, from which he was above quoted, was not served on the defen-  
dant, but was left with Miss Jackson at the Federal Building  
and at 121 West Chicago Avenue when there was no longer connection  
with the parties and the same time when there had not been  
connection with it and had no office at this place; while on the  
other side, counsel for Plaintiff says that the service of the  
notice was sufficient, and many other things which to the fact  
that on January 14, 1944, there were the letters from 121 West  
Chicago Avenue to Mr. Overst, which is evidence that he was  
located at the apartment at that time. But the difficulty with this  
evidence is that the 30 day notice of May 31, was not served  
for nearly 3 months after the letter of February 14, the evi-  
dence without contradiction shows that 121 West was in a bad state  
of health and was not even connected with the location for some time,  
except to some extent there occasionally. He failed the witnesses  
of the service of the notice and investigation and so the failure  
of Plaintiff that the evidence is in neither Plaintiff nor his  
family interests to comply the agreement is also insufficient.  
Plaintiff v. Jackson, 121 West, 121, and cases there  
after: Plaintiff v. Jackson, 121 West, 121, and cases there  
and that the finding of the court is for plaintiff is against the



~~8.~~  
manifest weight of the evidence.

(8) Defendant further contends that plaintiff was not the owner of the building in which the apartment was located. We think this contention cannot be sustained. The title to the premises was in plaintiff's name. The evidence shows it was sold to him in 1932 by his son-in-law, Mr. Dvorak, who testified that before the conveyance he owned the property and then sold it to his father-in-law, but that he "did not entirely divest myself of all interest in the property;" that he owed his parents-in-law moneys and gave them the title; that when he paid back all that he owed them, he would have the right to have the property conveyed back to him. Plaintiff and defendant having executed the lease, and possession having been taken by the 5 persons mentioned in the lease, we think defendant ought not now be permitted to say that plaintiff could not maintain an action for forcible detainer.

The judgment of the Municipal court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED. - ☐

9 Niemeyer, P. J., and Matchett, J., concur.





43331

CHARLES C. HOFFMAN, JR., WILLIAM  
BART and SALLIE PRIES,  
Appellants,

v.

BURNETT CENTRAL BUILDING, INC., a  
Corporation, and A. S. KIRKEBY, O.  
F. BURNETT and JOHN H. SCHWARZ,  
Individually and as officers and  
directors of said corporation,  
Appellees.

APPEAL FROM  
SUPERIOR COURT  
OF COOK COUNTY.

323 I.A. 36<sup>2</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiffs seek to reverse a decree of the Superior court of Cook county finding that the equities of the case were with the defendants and dismissing the complaint for want of equity.

August 8, 1944, plaintiffs, Charles C. Hoffman, Jr., who owned 11 shares, and William Bart, who owned 84 shares of the common stock of the defendant, Burnett Central Building, Inc., (which he acquired a few days before suit) filed their complaint in chancery against the Building Corporation and its officers and directors, namely, A. S. Kirkeby, O. F. Burnett and John H. Schwarz praying, (1) that an order be entered restraining defendants from proceeding with a meeting of the stockholders of the Building Corporation scheduled to be held August 9, 1944; (2) that the court restrain defendants from using any of the shares of stock which defendants had "purchased at \$30 per share" at the meeting and (3) upon a final hearing the court find that the defendant officers and directors had conducted the business of the Building Corporation in a fraudulent manner; that the purposes of the Corporation could no longer be accomplished, that it

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WILLIAM A. ROBERTS, JR.,  
HART AND WILLIAM ROBERTS,  
Appellants.

WILLIAM A. ROBERTS, JR.,  
HART AND WILLIAM ROBERTS,  
Appellants.

v.

ARMSTRONG CORP. BLDG. INC., a  
Corporation, and A. F. ROBERTS,  
J. ROBERTS and JOHN H. ROBERTS,  
Individually and as officers and  
directors of said corporation,  
Appellees.

8261A.86

THE JUDICIAL COUNCIL DELIVERED THE DECISION OF THE COURT.

By this appeal plaintiffs seek to reverse a decree of the  
superior court of Cook county finding that the equity of the  
case was with the defendants and disallowing the complaint for  
want of equity.  
August 8, 1944, plaintiffs, Charles G. Hoffman, Jr., who  
owned 11 shares, and William Hart, who owned 25 shares of the  
common stock of the defendant, Armstrong Corp. Bldg. Inc.,  
(which as acquired a few days before suit) filed their complaint  
in chambers against the Building Corporation and its officers  
and directors, namely, A. F. Roberts, J. Roberts and John H.  
Roberts saying, (1) that an order be entered restraining defen-  
dants from proceeding with a matter of the stock list of the  
Building Corporation scheduled to be held August 2, 1944; (2)  
that the court restrain defendants from using any of the shares  
of stock which defendants had "purchased at \$50 per share" at  
the meeting and (3) upon a final hearing the court find that the  
defendant officers and directors had conducted the business of  
the Building Corporation in a fraudulent manner; that the purchase  
of the corporation could no longer be accomplished, that it



2.

should be dissolved and the property sold "at not less than the guaranteed bid;" that the funds be distributed to the stockholders and that the defendants' officers and directors be prevented from receiving any proceeds as the result of their purchase of the stock of the Building Corporation, etc.

By leave of court, on August 10, plaintiffs filed an amendment to the complaint in which Sallie Pries, who was alleged to be the owner of 5 shares of stock in the defendant Building Corporation, was made an additional party plaintiff. And an additional prayer was added that the resolution of the stockholders of the Building Corporation passed August 9, 1944, be declared illegal and void, etc.

The record discloses that the defendant Building Corporation owned a building which was constructed in 1925, in the north part of Evanston, and which it leased for dormitory purposes, at a rental of \$36,000 a year to the National College of Education, a charitable institution which conducts a school nearby. The building when constructed, was subject to a large mortgage and during the depression there was a reorganization so that stocks and bonds were issued to the bondholders whose bonds were secured by a trust deed on the building. And in 1935 the Building Corporation leased the building to the college for a period of 5 years at a rental of \$12,000 per year. In 1940 this was renewed the lease expiring in 1947, at the same rental of \$12,000 per year. The Building Corporation proposed to sell the building which was its only asset and to distribute the proceeds to the parties entitled thereto and to cease doing business.

Conrad H. Poppenhusen, a lawyer who had been practicing law for many years in Chicago, was the chairman of the board of trustees of the college, and negotiations were begun between the Building Corporation and the college looking towards the sale of the



The first of these is the fact that the
 Corporation has been in existence for
 over twenty years, and has during
 that time been engaged in the
 business of selling and distributing
 its products throughout the United
 States. It has a large and
 extensive network of salesmen and
 agents, and has a large and
 extensive stock of goods on hand.
 It has also a large and extensive
 network of distribution channels,
 and has a large and extensive
 network of distribution channels.
 It has also a large and extensive
 network of distribution channels,
 and has a large and extensive
 network of distribution channels.

3.

building to the college. He was called by plaintiffs and testified that he was chairman of the board of trustees of the college for 15 years and in its behalf bought about 800 shares of the stock of the Building Corporation. When he was approached by defendant Kirkeby, of the Building Corporation, with reference to the sale of the building he stated that the college did not have any money at the time but if he were given a little time he might see if some of the "angels" of the college might be willing to donate money with which to buy the building. He testified further that he donated \$5,000, Mr. Norman D. Harris \$10,000, Mr. Sutherland \$5,000, Mrs. Amos Ball and Mrs. Cross \$3,000 each and that he used this money to buy stock of the Building Corporation, the proposed sale of it to the college having been rejected at a special meeting of the stockholders of the Building Corporation by reason of the fact that less than two-thirds of the shares of stock had been voted in favor of selling the building for \$75,000 and that afterward, through negotiations, he purchased the stock of the Building Corporation for the college paying \$30 a share, and the agreement with the representatives of the Building Corporation was that \$30 a share would be paid to any other stockholders who desired to sell his stock.

He further testified that there was no agreement when he purchased the 800 shares of stock from the officials of the Building Corporation that they would resign as officers and directors of the Building Corporation but that it was understood that when these officials sold out their interest they would resign and the stockholders would then elect new directors in their stead.

The evidence further is to the effect that if the building were sold for \$75,000 it would net the shareholders \$18 per share and that a few days after the proposed sale of the building for \$75,000 failed there were further offers for the stock and Mr. Poppenhusen offered on behalf of the college, \$30 a share. There



holding to the college. He was called by plaintiffs and testified that he was chairman of the board of trustees of the college for 12 years and in its behalf bought about 800 shares of the stock of the Building Corporation. When he was approached by defendant directly, or the Building Corporation, with reference to the sale of the building he stated that the college did not have any money at the time but if he were given a little time he might see if some of the "lump sums" of the college might be willing to donate money with which to buy the building. He testified further that he donated \$5,000, Mr. Norman G. Davis \$10,000, Mr. Sutherland \$5,000, Mrs. John Hall and Mrs. Gross \$5,000 each and that he used this money to buy stock of the Building Corporation, the proposed sale of it to the college having been rejected at a special meeting of the stockholders of the Building Corporation by reason of the fact that less than two-thirds of the shares of stock had been voted in favor of selling the building for \$75,000 and that afterward, through negotiations, he purchased the stock of the Building Corporation for the college paying \$30 a share, and the agreement with the representatives of the Building Corporation was that \$30 a share would be paid to any other stockholders who desired to sell his stock.

He further testified that there was no agreement when he purchased the 800 shares of stock from the officials of the Building Corporation that they would resign as officers and directors of the Building Corporation but that it was understood that when these officials sold out their interest they would resign and the stockholders would then elect new directors in their stead.

The evidence further is to the effect that at the building were sold for \$75,000 it would not the shareholders \$15 per share and that a few days after the proposed sale of the building for \$75,000 failed there were further offers for the stock and Mr. Thompson was offered on behalf of the college, \$30 a share. There



4.

had been 3 offers of \$75,000 for the building. The evidence further shows that the building was especially appropriate for a dormitory for the college.

Most of the evidence is shown by the record of the minutes of the Building Corporation. Defendants offered no evidence but at the close of plaintiffs' case the court entered the decree from which this appeal is taken.

The theory of plaintiffs is that defendants, the officers and directors of the Building Corporation were guilty of fraudulent conduct in disposing of their shares of stock to Mr. Poppenhusen, who represented the college, and as a part of the transaction in the sale of the stock they agreed to resign as directors of the Building Corporation so that new directors might be elected by the stockholders who would then be controlled by the college.

We have considered all the evidence in the record and there is little or no conflict or inconsistency in it. It is all substantially uncontradicted. We will not stop to analyze the argument of plaintiffs' counsel to the effect that the evidence shows there was a fraudulent scheme by the defendants' officers and directors of the Building Corporation, for we are clearly of opinion that the argument is wholly unwarranted. The defendants' officials and the others who sold their stock in the Building Corporation were endeavoring to get the most they could for their stock and there is no word of evidence nor argument of counsel that the price paid for the stock was not what it was really worth. There is no evidence of the value of the building nor any argument made on that ground.

The decree of the Superior court of Cook county is affirmed.

DECREE AFFIRMED.

Niemeyer, P. J., and Matchett, J., concur.

has been a matter of fact, and the following are the reasons for it. The fact is that the following are the reasons for it. The fact is that the following are the reasons for it.

First of all, the fact is that the following are the reasons for it. The fact is that the following are the reasons for it. The fact is that the following are the reasons for it.

The fact is that the following are the reasons for it. The fact is that the following are the reasons for it. The fact is that the following are the reasons for it.

Secondly, the fact is that the following are the reasons for it. The fact is that the following are the reasons for it. The fact is that the following are the reasons for it.

Thirdly, the fact is that the following are the reasons for it. The fact is that the following are the reasons for it. The fact is that the following are the reasons for it.

Fourthly, the fact is that the following are the reasons for it. The fact is that the following are the reasons for it. The fact is that the following are the reasons for it.

Fifthly, the fact is that the following are the reasons for it. The fact is that the following are the reasons for it. The fact is that the following are the reasons for it.

Sixthly, the fact is that the following are the reasons for it. The fact is that the following are the reasons for it. The fact is that the following are the reasons for it.



1823 A

Abstract

Gen. No. 10002

Agenda No. 2

In the Appellate Court of the  
State of Illinois

Second District

February Term, A. D. 1945.

In the Matter of the Estate  
of Walter S. Vanderwater,  
Deceased.

City National Bank of Kanka-  
kee, as Executor of the Last  
Will and Testament of Walter  
S. Vanderwater, Deceased,  
Appellee,

v.  
Richard S. Vanderwater,  
Appellant.

Appeal from the  
Circuit Court of  
Kankakee County.

326 I.A. 1

Dove, P. J.:

Walter S. Vanderwater died testate on January 30, 1930. His will, dated March 29, 1929, was admitted to probate, and the City Trust and Savings Bank, of Kankakee, was appointed executor by the county court of Kankakee County on March 4, 1930. On October 11, 1937, certain objections by appellant to current reports and to the final report of the executor, as amended, were sustained, and all his other objections were overruled. Both parties appealed to the circuit court, where the appeals were consolidated, and on January 1, 1940, the cause was referred to a special master to report his findings of fact and conclusions of law. Appellee and the executor bank were affiliates, housed in the same building, with practically the same officers, directors and stockholders. The two banks were merged on April 20, 1940, and it was stipulated that appellee succeeded to all the rights and liabilities of the two former banks.





On October 21, 1943, the special master filed a report recommending that three of appellant's objections be sustained, and that all of his other objections be overruled. Appellant's objections to the special master's report were ordered to stand as exceptions; appellee filed a supplemental report covering the period since the final report of the executor, and on the hearing the court entered a decree overruling the exceptions to the special master's report, approving the report, approving appellee's supplemental report, fixing the fees of the special master, and taxing all costs against appellant. The cause is here by an appeal from that decree.

The testator was a merchant, residing in Kankakee and left ~~XXX~~ surviving him his widow and appellant, his son by a former marriage, as his only heirs at law and as sole beneficiaries under his will. He was the founder, principal stockholder, president and manager of the Vanderwater Clothing Company, a corporation, which conducted a retail clothing business at Kankakee. He also owned about 1530 acres of land in Arkansas, in two tracts of about 1080 acres and 480 acres, respectively, divided into three farms, subject to three separate mortgages to a land bank. Part of the land was timber, and about 600 acres were farmed in raising rice. Up to the time of the testator's death the mortgages were in good standing, and rice was selling at a good price. His total indebtedness at that time was in excess of \$110,000.

The will gave the executor authority to sell and convey any and all real estate, the executor to use its own judgment as to the selection of the time when the sale should be made so as to get the best available price; also authority to sell



On October 22, 1912, the board of directors of the  
company, after a long and careful consideration of the  
and that all of the other objections be removed. The  
objection to the special master's report was ordered to be  
as presented; applied filed a supplemental report covering  
the points raised in the first report of the master, and in the  
filing the court entered a decree sustaining the application  
to the special master's report, approving the report, and  
the special master's report, finding the facts of the  
special matter, and finding all other objections. The  
cause is left to the special master for decision.

The master was a woman, residing in Chicago and  
left her husband and children, the age of a few  
years, as his only care at the time he was  
arrested. He was a man of good character, and  
honest, president and manager of the Vanishing  
company, a corporation, which conducted a retail clothing business  
at Chicago. He also owned about 1000 acres of land in  
Illinois, in the town of about 1000 acres and 400 acres, which  
were divided into three tracts, subject to lease contracts  
for a term of years. Part of the land was timber, and  
about 500 acres were timber in standing state. On the day  
of the master's death the mortgages were in good standing,  
and the net value of a good house, and other improvements  
at that time was in excess of \$100,000.

The will gave the executor authority to sell and convey  
any and all real estate, the executor to use all the property  
as he saw fit for the best interest of the estate, and to  
sell or lease the same for the best possible price; also authority to sell



any and all personal property, including stocks, bonds, or other securities, when in its judgment it would be advisable to do so; and directed that out of the proceeds of the real estate and securities the executor should pay the testator's wife, as soon as practical, \$10,000, and to appellant, his son, \$5000; that after such payments the executor should keep the remaining portions of the estate invested in good interest bearing securities, and pay one half of the net income to his wife, and the other half to his son, during the lifetime of the wife, and that after her death the executor should turn over to the son all the property on hand at that time, to be his absolutely, and that the estate should then be closed. The legacies were paid and the widow died during the course of administration.

At the time of the decedent's death the Arkansas land was being operated by him through a local manager. After the decedent's death, a memorandum dated March 21, 1928, signed by him, was found, stating it was by way of information and advice if he should be taken away suddenly, and among other things, stated: "Land in Ark. should be sold as it is hard to handle same. (best price can get) Subject to mortgage to S. W. Joint Stock Land Bank." At the time of his death he had contracted with the local manager to operate the farm for 1930. Shortly after the executor qualified, a written instrument, dated March 28, 1930, was executed by the widow and appellant, which, after reciting that the decedent was operating the rice plantations at the time of his death through a farm manager, under a contract for the year 1930, stated that the signers "consent that said rice farms in the State of Arkansas may continue to be operated by City Trust & Savings Bank of Kankakee, Illinois, as executor of the estate of said Walter S. Vanderwater and that the said bank may advance all neces-





sary funds for the operation of said farms and borrow money, if necessary, for that purpose. \* \* \* this consent shall continue and be operative until revoked in writing by the undersigned." It was never revoked.

Under this arrangement, the executor farmed the rice land for two years, through Mr. Mueller, its cashier and trust officer, thereafter renting it to tenants, and finally sold the land in February or March, 1935, meanwhile disposing of certain stocks of the estate. Part of the farming equipment was sold in February and March, 1934, a Chevrolet truck and a tractor were sold in March and April, 1935, and two other trucks were not sold until March and April 1936. The sale in February, 1934, was by order of the county court,

115 objections were filed to the executor's reports, 70 of which were abandoned. The principal grounds urged for reversal are that the county court, and therefore the circuit court on appeal, had no jurisdiction of the account as to the Arkansas lands, for the reason that it was a trust estate; that the court erred in overruling the objections as to losses sustained in the sale of the Arkansas land, and to losses incurred in the operation thereof by the executor during the course of administration; in overruling objections to losses sustained in the sale of certain stocks, and by failure to collect certain notes, and to fees charged and taken by the executor. ~~Objections not argued are considered abandoned.~~  
~~There is a gross error of Chicago, 325 721, 188, 322.~~ No gross error is assigned as to the sustained objections.

As to the question of jurisdiction, it is a familiar principle of the law that until all the debts and legacies are paid, an estate cannot be closed and a trusteeship opened in



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the circuit court. (Wylie v. Bushnell, 277 Ill. 484, 507.)

Under the terms of the testator's will, the legacies were payable only out of the proceeds of sales of real and personal property by the executor, and the executor was not given any trust duties until after the payment of the legacies. The legacies were not all paid until April 13, 1935, after the Arkansas land was sold, and two tractors used on the land were not sold until March and April, 1936, the year that the widow died, and the executor then promptly filed its final report. The will itself expressly set the time for closing the estate as at her death. A trust in the residue of property committed to an executor can only become operative after the settlement of the estate is completed and the trustee receives the property from the executor. The jurisdiction of probate courts extends to all matters necessarily involved in the disposition of the estates of deceased persons from the time of the owner's death until the property has been placed in the possession of those to whom it devolves. (In re Estate of Mortenson, 248 Ill. 520, 525, 527; Wylie v. Bushnell, supra; In the Matter of the Estate of Corington, 124 id. 363, 366.) The sale of real estate to pay legacies is a probate matter and is an incident to the settlement of the estate. (Rosen v. Rosen, 370 Ill. 173, 175.) Furthermore, appellant is inconsistent in making no objection to the executor's accounts relating to collection of rents of the testator's building in Kankakee, and the payment of taxes, insurance, and other items thereon. Cases cited by appellant have no application here, and his contention as to lack of jurisdiction is without merit.

Appellant's claims that the executor is liable for losses in certain transactions will be considered under the head-







ings hereinafter mentioned.

Sale of Federal Life Insurance Company Stock.

At the time of the testator's death he owned 46 shares of the stock of the par value of \$100 each, and they were inventoried at \$4600. On May 6, 1930, Mr. Mueller, the executor's trust officer, wrote the Harris Trust and Savings Bank, of Chicago, inquiring about the market value of the stock, and the next day the bank wrote him that a local broker advised them that he could probably sell it around \$250 per share. On the same day the executor received a letter from Hitchcock and Company, in which they said: "We have checked the market value of the stock with a broker here in Chicago and he informs us that there is a very inactive market range from \$240 to \$250." The assistant treasurer of the insurance company testified that on February 24, 1930, there had been a sale of 5 shares by one stockholder to another at \$250 per share, and a like transaction as to 4 shares on April 3, 1930; that stockholders were willing to pay more than outsiders because they wanted to increase their holdings; that he saw the checks, but had no part in the transactions other than to issue the new certificates, and did not know what other factors might have entered into the transactions; that it was difficult to give an opinion as to the market value in 1930, because the stock is closely held and not listed on any exchange; that the capital stock was increased in 1930 from \$500,000 to \$750,000, and that 11 shares were sold at \$135 per share on January 12, 1931; that he could have purchased stock during that month at \$110 per share; and that there was no market value of the stock.

On December 30, 1930, Mr. Mueller wrote appellant concerning the assets of the estate, listing the stock at \$125





per share. In June, 1931, there was a reorganization of the insurance company, and the capital stock was reduced from 7500 shares of the par value of \$100 each, to 37,500 shares of the par value of \$10 each, and the testator's 46 shares were exchanged for 230 shares of the new stock, which were sold by the executor on July 31, 1931, by order of the county court, for \$3390, which Mr. Mueller testified was the market value at that time, and his testimony is not contradicted. Appellant claims the executor should account for this stock at \$250 per share. Up to 1931 the stock was paying dividends of 10% in quarterly installments, and for the year 1930 the executor received \$460 in dividends, in addition to \$574.50 for some script issued by the company in 1930, making a total of \$1034.50 received on the stock in that year.

It is well known that the world wide depression which started suddenly in October, 1929, and grew increasingly worse in the succeeding years, was the cause of more financial losses than any other casualty in history, and it is equally well known that during the first few years thereof it was almost universally considered as only temporary, from which there would be an early recovery. Under that belief, countless numbers of ordinarily prudent, experienced individuals, fiduciaries, business and financial institutions held onto their investments, and thereby suffered increasing losses, without fault or negligence on their part. The acts of the executor in this case are no exception to those of the general run of other ordinarily prudent, experienced security holders in connection with their own affairs. There was nothing about the stock or the circumstances that indicated that it should be disposed of earlier, and only two dividends were passed before it was sold. This was not an uncommon experience with other ordinarily prudent security holders. Although, as remarked in



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ordinarily prudent security holders. Although, as mentioned in  
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started suddenly in October, 1929, and grew increasingly

In re Busby, 288 Ill. App. 500, relied upon by appellant, no mpratorium was declared by the courts on account of the depression on the due performance of their fiduciary duty by executors, and every case of this class is sui generis, it is the well settled law in this State that while a fiduciary must act with the highest degree of fidelity and with the utmost good faith, he is not liable for mere mistakes in judgment, and is held to the exercise of only that degree of skill and diligence which an ordinarily prudent man would exercise under like circumstances in connection with his own affairs. Nothing more can be required of him, and if his acts will stand the test of that rule, he cannot be held liable for any loss that may be sustained by the estate. (Christy v. Christy, 225 Ill. 547, 552, 553; Wylie v. Bushnell, 277 id. 484, 505; Chicago Title and Trust Co. V. Chief Wash Co., 368 id. 146, 155; Cowles v. Morris and Co., 350 id. 11, 25.) The fact that the executor was qualified as a trust company and advertised for trust business does not change the rule as to its liability. In this case, the executor's acts stand the test of the rule, and the trial court correctly approved the special master's report as to this item.

Sale of Vanderwater Clothing Company Capital Stock.

This objection goes to the sale by the executor of 120 shares of the capital stock to Paul Diamond, Arthur A. Carlson and Fred Wischnowski on February 27, 1933, under an order of the county court, and appellant claims that the executor should account for the difference between the par value of the stock and \$1000 as the sale price, with interest at 10% from two years after the date of the letters testamentary. The capital stock consisted of 150 shares of the par value of \$100 each.



In the event, the bill will be introduced in the House of Representatives and will be referred to the Committee on Education and Labor. It is the intention of the bill to provide for the establishment of a National Board of Education, which will be composed of representatives of the various States, the Federal Government, and the people. The board will be authorized to make recommendations to the President and Congress regarding the improvement of the national education system. The bill also provides for the establishment of a National Council of Education, which will be composed of representatives of the various States, the Federal Government, and the people. The council will be authorized to make recommendations to the President and Congress regarding the improvement of the national education system. The bill also provides for the establishment of a National Commission on Education, which will be composed of representatives of the various States, the Federal Government, and the people. The commission will be authorized to make recommendations to the President and Congress regarding the improvement of the national education system.



At the time of the testator's death he owned 110 shares, E. J. DesLauriers owned 10 shares, Henry S. Leavitt owned 20 shares, and the other 10 shares were owned by the purchasers. On July 15, 1930, the executor acquired the 10 Des Lauriers shares in cancellation of his note to the testator for \$2078.66, and these 10 shares were sold with the other 110 shares. The corporation was the tenant of a building owned by the testator, built for that purpose.

The balance sheet of the corporation, of January 31, 1933, showed assets listed as follows: Cash, \$126.60; Accounts receivable, \$2, 495.15; Inventories, \$19,062.41; Furniture and fixtures, \$9,255.33. The liabilities listed, exclusive of the capital stock of \$15,000, and surplus stated as \$476.46, were: Notes payable, \$7100; Accounts payable, \$3,275.22; Accrued expenses, due Vanderwater estate, \$1,670.16. The business had been losing money ever since the testator's death, and prior thereto, totaling \$32,922.13 for the years 1929-1932, both inclusive, and in 1933 the purchasers lost about \$4500, after putting more than \$6000 new capital into the business.

The proposal by the purchasers for the sale was on the following terms; The purchasers to pay \$1000 cash; pay at least \$3000 on the corporation's note for \$7106 to the City National Bank of Kankakee; execute a new corporate note to the bank for the balance of \$4,100, secured by their personal endorsement; reduce the bills payable to the extent of \$3,000; deliver a bill of sale to the executor for all fixtures and equipment in payment of the corporation's indebtedness to the estate of \$3,415.65; enter into a new lease at a rental of 5% of the gross sales, but not less than \$150 per month for the

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first year, and not less than \$200 per month for the remaining 4 years, in advance each month; the lease to include the building, fixtures and equipment. Mr. Leavitt was also to relinquish all his interest in the business and transfer his stock in cancellation of his debt to the corporation of approximately \$250. The sale was carried out in accordance with those terms.

The building was mortgaged for \$33,000, and there were several vacancies in the same block. About \$2400 of the corporation's debt to the estate was owing for the testator's salary. As the depression got worse, sales decreased, and the bank had gone as far as it could in loaning money to the corporation. At the beginning of 1933, the stock was broken and run down, the purchases had been small during the previous season, and it consisted of odds and ends, some of it rather old. The purchasers paid the corporation's obligations, and paid the stipulated rent up to the time the building, fixtures and equipment were turned over to appellant, and he ultimately sold them for about \$8000 or \$9000. Mr. Leavitt had offered in February, 1933, to acquire the business without any payment of money to the executor, but the offer was not accepted. Another offer by the Charles E. Wry Company, of New York, whose financial or credit rating is not shown, had also been rejected. The offer was \$11,250 for half the capital stock, provided the bank would furnish the money, take the stock for security, and establish a permanent credit in the bank for \$5000.

Herman A. Nelson, a disinterested expert, associated with Hart, Schaffner and Marx, wholesale clothiers, in the credit and retail departments, and who had many assignments to country stores in difficulty, testified that the Vanderwater corporation had difficulty in 1932 and the early part of





1933, in paying his employer's account, and that he went there at the invitation of Mr. Leavitt, who was figuring on getting the business going, either by a sale or buying it himself; that it was a tough stock of aged merchandise, with a fair market value of 25% on the dollar; that a good price for the fixtures would be \$2500; and that taking into consideration the debts of the corporation, the capital stock had no value. His testimony is not disputed, and shows that the corporation was actually insolvent. Mr. Diamond testified that with the depression, unemployment, and banks closing, they considered the accounts receivable worth about 60% on the dollar.

Appellant claims that the sale was not in good faith, and that a fraud was practiced on the court, because the petition and order for sale mentioned only the \$1000 as the sale price, and that the other terms were not disclosed to the court. Appellee contends that although the petition and order mention only the \$1000, there was a hearing and the situation was laid before the court. However that may be, it is obvious that the other terms of the sale, by which the estate's account was collected, and an advantageous lease was secured by the estate, whereby the executor would be able to make payments on the mortgage on the building, and the improvement of the financial condition of the corporation, whereby it would be better enabled to carry out the terms of the lease, was of great advantage to the estate; whereas, if the sale had not been made, the business obviously would have failed, the estate's account would have been jeopardized, and it would have had a vacant building, and the mortgage would probably have fallen into default. While the losses of the business had decreased each year since 1930, the business had gotten into







such a perilous state that any prudent person would have recognized that it should be sold. The offer of the Wry Company was manifestly one that no bank or vendor would accept, and the sale was on much better terms than those offered by Mr. Leavitt. It is apparent that even if the court was not advised of the other terms of the sale, they would have only furnished a stronger reason for ordering the sale. The claim that the sale was not in good faith and was a fraud on the court is without merit. Considering all the testimony, the executor made a good sale, and the court correctly approved the special master's report in this respect.

#### Operation and Sale of the Arkansas land.

In 1928, the directors of the two banks mentioned formed a \$50,000 common law trust, called the Kankakee Farm Land Trust, to take over farms that they had to take on their mortgages. The testator had 35 shares or \$3500 in the trust, which, when liquidated, paid 17½%, and the estate received its proportion of the proceeds. One of the farms owned by the land trust consisted of 320 acres of rice land near the testator's Arkansas land, and was known as the Brosseau farm. It was operated by the testator in his life time, through the same farm manager that operated his lands, and after his death, it was operated for the land trust by Mr. Mueller, through the same farm manager, until it was sold about a year after the testator's Arkansas lands were sold.

Appellant claims that he is not bound or estopped to object to losses and expenses in the farming operations of the testator's lands on account of signing the instrument authorizing the executor to operate the land, for the reason that the executor occupied a fiduciary relation to him, and that he was not advised and the executor did not make a full





disclosure to him of the necessary facts. He also claims that the testator's lands were operated in connection with the Brosseau farm for the benefit of the land trust, and that the written memorandum left by the testator advised an immediate sale of the testator's Arkansas land.

The authorization mentioned, after being signed by the widow, was sent by mail to appellant at Cambridge, Massachusetts, on March 28, 1930, and was signed by him, and returned to the executor on April 1, 1930. Prior thereto, the executor wrote him, requesting that he stop at Kankakee on March 4, 1930, on his way to California, to which he replied that he could not come. He testified that he did not think it worthwhile to comply with the executor's request or consult with them as he knew nothing of the estate, and that he did not make any effort to get in touch with the executor and discuss matters. The executor's officers never saw him until 1940, although he was in Milwaukee in December, 1930. On March 27, 1930, the executor wrote him that it would be necessary to advance considerable money to finance the growing of the rice crop, as the land was not rented, but was being operated by his father, and that the executor was advised that \$10,000 or more would be necessary, and stated: "I hope you will feel free to ask us any questions that you care to in regard to estate matters." The letter sent to him with the contract, dated the next day, was of similar import, and stated that their power as executor was somewhat limited, and they might find it necessary, in order not to sacrifice some of the securities, to borrow some money. In his letter returning the signed agreement, appellant stated: "Certainly that's quite all right. I would not wish you to have to sacrifice any of the estate", and thanked the executor for the de-



1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the American Friends Service Committee in the Philippines.

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tailed explanation. Cases where a fiduciary concealed important facts from the beneficiary, cited by appellant, have no application here.

The claim that the testator's lands were operated for the benefit of the land trust in connection with the Brosseau farm is without any foundation. The sole ground for the claim is that there was some interchange in the use of implements, but it also shows that the Brosseau farm had more implements in comparison with its acreage than the testator's land, and it does not show that the testator's estate contributed any labor or expense in the operation of the Brosseau farm, but shows the contrary. It is also to be observed that the memorandum written by the testator concerning the sale of the land was written about one year prior to the date of his will, in which he stated that the executor was "to use its own judgment as to the selection of the time when the sale should be made so as to get the best available price for said real estate." He kept the land and farmed it up to the time of his death, and had entered into a contract for a new tractor, which the executor paid for, and he had employed his farm manager for the coming year. It is also to be noticed that appellant did not take the deposition of the farm manager, although he went to Arkansas with an attorney for that purpose. The presumption in such a case is that the testimony of the farm manager would have been unfavorable to him. This observation also applies to the other objections of appellant in connection with the Arkansas land.

Within the limits to which an opinion should be confined, it is impracticable to discuss in detail the other objections urged to the operation of the Arkansas lands. The



The following information was obtained from the records of the Department of the Interior, Bureau of Land Management, regarding the land owned by the United States in the State of California:

1. The total area of land owned by the United States in California is approximately 100 million acres.

2. The majority of this land is located in the western part of the state, particularly in the areas surrounding the San Francisco Bay Area and the Central Valley.

3. The land is primarily used for agricultural purposes, although some portions are reserved for public recreation or other uses.

4. The Department of the Interior is responsible for managing this land, ensuring its proper use and protecting it from unauthorized encroachment.

5. Any person wishing to acquire land owned by the United States must first obtain approval from the Department of the Interior.

6. The acquisition process typically involves a public hearing and the submission of a proposal detailing the intended use of the land.

7. Once approved, the land may be sold at auction or through other means as determined by the Department of the Interior.

8. The proceeds from the sale of the land are typically deposited into the Treasury of the United States.

9. The Department of the Interior also maintains a system of public lands, which includes national forests, parks, and monuments.

10. These lands are managed for the benefit of the present and future generations, and their use is subject to strict regulations.

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located west to the northeast of the island. The island is a low, flat, and is covered in dense vegetation. It is a small island, and is located in the middle of the lagoon. The island is a small, flat, and is covered in dense vegetation. It is a small island, and is located in the middle of the lagoon.



evidence conclusively shows that the expenditures were only such as were necessary and that they were for the benefit of the estate. It also shows that during the two years that the executor operated the land the operations were carefully conducted in a business like manner, and the crops were duly sold at the market price. Due to the necessary expenses of raising the crops, and the drop in the price of rice, the mortgages became in default, although several payments were made thereon, and at the insistence of the mortgagee the implements were mortgaged to it in July, 1932, as additional security, the land was rented to tenants, and finally, because of continued defaults, due from a lack of income and a decrease in the price of rice, the mortgagee insisted that the implements and the land be sold, which was done, in order to save foreclosure, During that time the executor filed three detailed current reports, a copy of the first one of which was sent to appellant, and a final report up to December 23, 1936, and appellant did not make any objection to any of them until his objections to the final report.

The land was sold in February or March, 1935. An Arkansas lawyer and farmer who was familiar with the land and with land prices, having handled some 20 to 25 sales of land in that and an adjoining county, testified that the fair price of the Vanderwater land in 1935 was \$25 per acre, and the broker who sold it testified that \$26 per acre would be good price for it. This fixes the gross value at from \$58,250 to \$39,780. The amount of the incumbrances was then \$35,964.61, making the net value from \$3,815.39 to \$2,285.39. The land sold for \$2970.70 net, the purchaser assuming \$1627.71 delinquent taxes and a delinquency of \$1812.80 on the mortgages. Not counting the latter item in the purchase price, the sale brought \$4597.71, or \$782.32 more than the net value of the land at its highest figure above. The fact that \$100 was paid

of the world. The world is a vast and beautiful place, and it is our duty to protect it. We must take care of the environment, and we must respect the rights of all people. We must work together to make the world a better place for everyone.

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The land was sold at auction to the Government of India in 1907. The land was sold at auction to the Government of India in 1907.



out of the gross proceeds of the sale to one of the tenants for surrendering his lease, does not tend to establish bad management or an unauthorized expenditure. The farm equipment was sold for \$1492.50. Naturally, after being used two years, it could not be expected to bring the value at which it was inventoried, and appellant's claim that the executor should account for it at inventory value cannot be upheld. The fact that the thresher was used to thresh one crop on the Brosseau farm after the testator's land was sold, is accounted for by the fact that it was not sold at an earlier sale of farm equipment, because Mr. Mueller doubted that a purchaser could be found, and it was stored on the Brosseau farm. This item is so inconsequential as to merit no consideration. So, too, the objection to the farm land trust agreeing to pay \$25 rent for a tractor and to put the same in as good condition at the end of the season as it then was, in place of a proposal by the mortgages to pay a flat \$40 rent for it, does not show that the estate suffered thereby; and the fact that the executor purchased seed rice from the farm land trust instead of using rice from the testator's land for seed, does not establish an unwarranted expenditure.

Appellant's claim that the value of the equity in the land at the time of the testator's death was fixed by the Arkansas Commissioner of Revenue at \$19,341.10 for Inheritance tax purposes, is not borne out by the record. That amount was fixed by the Commissioner, as the net value of the whole estate in Arkansas, which included rice on hand sold for \$1936.89, an account in a closed bank of \$514.28, and the farm implements and equipment, the value of which at that time does not appear in the record, and there is no convincing evidence of what the testator paid for the land. Assuming that the value of the land





was less at the time of the sale than it was at the time of the testator's death, that would be because of the depression, from which an early recovery was anticipated. It is to be remembered that the executor was operating the land, instead of selling it, by appellant's express authority, and there is no testimony that shows that the executor could have realized more money for the estate by an earlier sale, or could have found a purchaser at all. One of the witnesses testified it was even hard to find tenants, because everybody was broke. Appellant's claim that the acts of the executor were reckless and unwarranted, that he was unsophisticated and timid, and relied upon the executor, is found against him by the special master, who found that he was alert, well informed on the situation in the case, had a college education, and his only apparent handicap was a difficulty in his speech. The trial court correctly overruled the exceptions to the special master's report in connection with the operation and the sale of the Arkansas land.

Note of E. J. DesLauriers.

Appellant claims the executor should account for the difference between the \$2078.66 note and the value of the stock for which it was exchanged. The testimony shows that DesLauriers' home was mortgaged for \$3900, and there is no testimony that tends to show the note could have been collected out of his equity above his homestead exemption, or that he had any other property subject to execution. Although he was working for the Vanderwater Clothing Company at a salary of \$30 to \$35 a week, he could have defeated garnishment by quitting his job. He claimed to the executor that the note was given for the purchase of the stock, at the testator's insistence, to be paid only out of dividends, and that he was otherwise unable to pay it. The petition for the order to make the exchange







recites that the note was given for the purchase of the stock, which was held as collateral; that the note represented only part of the purchase price; recites DesLauriers' claim as to the agreement with the testator; that the agreement could not be carried out because of the testator's death and that his estate must be settled; that DesLauriers was willing to lose the amounts paid on the note, and that the widow thought the proposition should be accepted. The testimony indicates that the amount credited on the note was by way of dividends, and the order recites that the court heard evidence and found the matters and facts set out in the petition to be true, and ordered the exchange to be made. We find no merit in this objection of appellant.

E. B. Roy Notes.

Two notes signed by E. B. Roy, both dated November 29, 1927, one of them for \$500, due June 1, 1928, the other for \$2500, due November 29, 1928, were found after the testator's death among his papers at the store, in an envelope, marked "N.G." in the testator's handwriting, containing other worthless notes. A certificate by the clerk of the United States District Court for the Western Division, Eastern District of Arkansas, in the jurisdiction where Mr. Roy resided, showing that there were no bankruptcy proceedings against E. B. Roy, between January 1, 1924 and November 27, 1941, was introduced in evidence by appellant. He also introduced in evidence a copy of a petition and schedule from the same court in the matter of the bankruptcy of E. R. Roy, to show that the notes of the testator were not included therein, and on objection of appellee's counsel that it was apparently not the same person in question in this case, appellant's counsel stated that he did not think there could be any question as to the identity

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be did not think there could be any question as to the intention  
and in question on this case, appellant's counsel asked that  
of appellee's counsel that it was apparently not the new ver-  
of the former very not included herein, and in objection  
member of the majority of 7 to 2, it was held the same  
copy of a petition was submitted from the same court in the  
in evidence by appellee. The same instrument is evidence a  
between January 2, 1924 and November 27, 1924, and introduced  
that there were no handwriting specimens submitted from 1924 to 1927,  
apparent, in the introduction made by the appellant, stating  
District Court for the Western District, Kansas, District of  
less than. A certificate by the clerk of the United States  
"K.G." in the respondent's handwriting, containing other words  
cents away the papers of the state, in no certified, written  
1920, the respondent, it being said that the respondent's  
1927, one of them the word, one June 1, 1927, the other the



of the persons. Two disinterested witnesses testified they knew E. B. Roy went into bankruptcy. An Arkansas lawyer who tried unsuccessfully to collect the notes for the testator, testified there was an unsatisfied judgment against Mr. Roy for \$29,335, and two others for \$213.70 and \$227.56; that he is insolvent and so far as he knew had been hopelessly insolvent for 17 or 18 years. Mr. Roy bought a small home, and also bought some land, both of which he lost on foreclosure. The home was exempt under the Arkansas law, and his earnings were less than his statutory exemption. There is no showing that the executor could have collected any part of the note, and the exception to the special master's report in this respect was correctly overruled.

Certificate of indebtedness of Arkansas Rice-Growers' Co-operative.

The certificate, held by the testator, was for \$294.16, and the executor sold it on September 21, 1935 to a bank for 50¢ on the dollar, or \$147.08, after trying unsuccessfully to collect it. No dividends had been paid on the stock, and the Co-operative went into bankruptcy on January 15, 1936. Appellant introduced no testimony tending to show that the certificate was worth any more than the amount received for it, and the fact that Mr. Mueller testified that he did not find in the executor's files any petition or order for the sale, does not establish that no such order was made, and at any rate, the transaction amounted to an apparently good collection of a poor claim. There is no merit in appellant's objection to this item.

Failure to Pay Interest on Estate Account.

This objection is based on the fact that on July 1, 1930, the bank paid \$13.09 on the account, and the testimony of a certified public accountant, and his audit, showing yearly aver-



[illegible][illegible]

Charming, intimate, and beautiful to see and hear!

On the 1st of January 1961, the following is listed on the list on page 1, 1961:

age balances in the account during the whole period ranging from \$2000 to \$4900. The special master found the yearly average balances to be more than \$3000, and disallowed a charge of \$8.00 interest on borrowed money, and a charge of \$179.02 on an overdraft. The accountant testified that he arrived at the monthly balances by totaling the daily balances and dividing by the number of days in the month. Under this method, if the balance was \$1.00 for the first 29 days of a 30 day month, and \$100,000 was deposited on the last day of the month, the average monthly balance would show as \$3333.66. His yearly average balances were arrived at by dividing such average monthly balances by the number of months. This method does not reflect the actual conditions of the account. There is no testimony that the executor bank or any other bank agreed or that it was customary to pay interest on monthly or yearly balances so computed. Mr. Mueller testified that at first the estate account was carried in one account, but that beginning with the first report, the income account was segregated from the principal account, and that while there was a substantial amount in the principal account during the administration, there was a continuous debit balance or overcharge in the income account from the time of the first report which more than offset the principal account, so that if the two accounts were merged it would have shown a debit balance most of the time. The payment of the \$13.09 interest on July 1, 1930, was before there was any <sup>segregation</sup> ~~segregation~~ of the accounts. There was no error in overruling the exceptions to the special master's report as to this item.

Fees Charged by the Executor.

Appellant's objection to this item is two-fold. First, that the acts of the executor were such as to forfeit any claim



The above information was obtained from the records of the Department of the Interior, Bureau of Land Management, and is being furnished to you for your information.

Sincerely,  
[Signature]

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.



to fees; and second, that if any fees are to be allowed the executor, the amount recommended by the special master, \$3500, appellant's exception to which was overruled, is excessive. The first contention is disposed of by what we have above said as to the acts of the executor, and, considering the work performed by it throughout the period of administration, together with the amount and character of the estate, many assets and liabilities of which, and transactions in connection therewith, are not herein mentioned, or complained about, the amount allowed is ~~very~~ reasonable. ~~and is not subject to appellant's~~  
~~exception.~~

We find no error in the decree of the circuit court, and it is affirmed.

Decree affirmed.

to find out what is the best way to do it. The  
question, however, is not whether it is possible to do it,  
but whether it is worth the trouble. In the first place,  
the time and money spent in doing it may be very small.  
The second question is whether it is worth the trouble.  
The third question is whether it is worth the trouble.  
The fourth question is whether it is worth the trouble.  
The fifth question is whether it is worth the trouble.  
The sixth question is whether it is worth the trouble.  
The seventh question is whether it is worth the trouble.  
The eighth question is whether it is worth the trouble.  
The ninth question is whether it is worth the trouble.  
The tenth question is whether it is worth the trouble.

There is no doubt that it is worth the trouble.  
The answer is yes.

The following is a list of the questions asked by the  
committee. The questions are as follows:  
1. What is the best way to do it?  
2. Is it worth the trouble?  
3. What is the best way to do it?  
4. Is it worth the trouble?  
5. What is the best way to do it?  
6. Is it worth the trouble?  
7. What is the best way to do it?  
8. Is it worth the trouble?  
9. What is the best way to do it?  
10. Is it worth the trouble?

In the Appellate Court of the  
State of Illinois  
Second District

February Term. A.D. 1945.

Anderson Bros. Mfg. Co., an  
Illinois Corporation, and Swan  
F. Anderson,  
Plaintiffs-Appellees,

v.  
G. A. Larson,  
Defendant-Appellant.

Anderson Bros. Mfg. Co.,  
Plaintiff-Appellee,  
v.  
G. A. Larson,  
Defendant-Appellant.

\*  
Swan F. Anderson,  
Plaintiff-Appellee,  
v.  
G. A. Larson,  
Defendant-Appellant.

3261.A. 2'

Appeal from the  
Circuit Court of  
Winnebago County.

Dove, P. J.:

This is an appeal from a decree of the circuit court of Winnebago County, decreeing specific performance of an alleged verbal agreement between the parties, concerning the assignment of certain shares of stock in plaintiff corporation.

Appellees, Anderson Bros. Mfg. Co., a corporation, and Swan F. Anderson, filed their complaint for specific performance against appellant, G. A. Larson, on July 31, 1940 alleging a verbal agreement between appellant, through his



1934

1934

In the Appellate Court of the  
State of Illinois  
Second District

January Term, A.D. 1934

3501 A. 35

Anderson Bros. Mfg. Co., et al  
Illinois Corporation, and John  
F. Anderson,

Plaintiffs-Appellants,

v.

G. A. Larson,  
Defendant-Appellee.

Appeal from the  
Circuit Court of  
Winnebago County.

Anderson Bros. Mfg. Co.,  
Plaintiff-Appellee,

v.

G. A. Larson,  
Defendant-Appellant.

\*

John F. Anderson,  
Plaintiff-Appellee,

v.

G. A. Larson,  
Defendant-Appellant.

Docket, P. 3.

This is an appeal from a decree of the circuit  
court of Winnebago County, granting specific performance of  
an alleged verbal agreement between the parties, concerning  
the assignment of certain shares of stock in plaintiff  
corporation.  
Appellees, Anderson Bros. Mfg. Co., a corporation,  
and John F. Anderson, filed their complaint for specific per-  
formance against appellant, G. A. Larson, on July 31, 1933,  
alleging a verbal agreement between appellant, through his

attorney, B. Jay Knight, and appellees, whereby appellant was to assign 2000 shares of the capital stock of Anderson Bros. Mfg. Co., in the possession of the corporation, for the purchase price of which he had given his promissory note to the corporation for \$9000.00 dated September 7, 1928, due on 30 days demand, on which there was due an unpaid balance of \$4,353.37, and the corporation was to cancel such note. It was further alleged that appellant was also to assign to Swan F. Anderson, 1400 shares of stock in the corporation and Anderson was to cancel appellant's promissory note to him for \$2500.00, dated May 7, 1930, due on 30 days demand, given for the purchase of 1000 shares of stock in the corporation, on which note there was due an unpaid balance of \$2166.43, plus accrued interest, and that Anderson was also to pay appellant the sum of \$2800.00; that the transaction was to be completed through the Illinois National Bank and Trust Co.; that the corporation delivered a letter to the president of the bank, with the two notes, the stock certificate for the 2000 shares, and a check for \$2800.00, with the understanding that the notes would be cancelled, and the check delivered to appellant on his delivery to the bank of the stock certificates assigned; and that appellant refused to comply with his part of the agreement; that appellant was represented by B. Jay Knight and John E. Goembel, attorneys, and that the negotiations were conducted between Swan F. Anderson, individually, and as president of the corporation, and B. Jay Knight, as attorney for appellant, and that notice of claim of attorneys' lien had been served upon appellees and the bank.

Appellant filed a counter claim against the corporation



attorney, R. Jay Wright, and appellant, whereby appellant was  
to assign 2000 shares of the capital stock of Anderson Bros.  
Mfg. Co., in the possession of the corporation, for the purchase  
price of which he had given his promissory note to the corporation.  
On June 1, 1930, appellant was also to assign to Owen F. Anderson, 1400  
shares of stock in the corporation and Anderson was to cancel  
appellant's promissory note to him for \$2500.00, dated May 7,  
1930, due on 30 days demand, given for the amount of 1930  
dividend of stock in the corporation, on which note there was  
due an unpaid balance of \$1150.00, plus accrued interest, and  
that Anderson was also to pay appellant the sum of \$2500.00, and  
the transaction was to be completed through the Illinois  
National Bank and Trust Co.; that the corporation delivered a  
letter to the president of the bank, with the two notes, and  
stock certificate for the 2000 shares, and a check for \$2500.00,  
with the understanding that the notes would be cancelled, and  
the check delivered to appellant on the delivery to the bank  
of the stock certificates assigned; and that appellant received  
a copy with his part of the agreement; that appellant was  
represented by R. Jay Wright and John E. Campbell, attorneys,  
and that the negotiations were conducted between Owen F.  
Anderson, individually, and as president of the corporation,  
and R. Jay Wright, as attorney for appellant, and that notice  
of claim of attorney's lien had been served upon appellant and  
the bank.

Appellant filed a counter claim against the corporation



and its secretary, on account of the alleged refusal to allow appellant to examine the books of the corporation, and an answer denying the authority of his attorneys to make such an agreement, and setting up the Statute of frauds as a defense. Issue was joined on the counter claim and the answer, and the cause was referred to the master in chancery, who filed a report finding the alleged agreement was within the Statute of Frauds and not enforceable. Appellees' objections to the report were ordered to stand as exceptions, and the cause was taken under advisement.

While the cause was still pending, appellees respectively instituted suits against appellant on the two notes, without any reference to the pending action. Later, an amendment to the complaint in the original suit was filed, alleging demands for the payment of the notes, the threatening of suit thereon, and that appellant employed his attorneys to represent him in the settlement and adjustment of existing accounts between him and appellees, and to avoid litigation in respect to the payment of the notes; that on March 20, 1940, appellant's attorneys contacted appellees and entered into a settlement agreement, restating the agreement in substantially the same terms as set out in the original complaint, except that the amendment alleges the 2000 shares were to be assigned to the plaintiffs, and that the \$2800.00 was to be paid by the plaintiffs; that appellant, through his attorney, B. Jay Knight, designated the Illinois National Bank and Trust Co. as the place of deposit of the \$2800.00 and the notes, and agreed to accept delivery to the bank, as appellant's agent, as a settlement of said account; that appellees had fully complied with the agreement, and that appellant, through his agent, the bank,

and its necessity, in support of the alleged refusal to allow  
appellant to examine the books of the corporation, and an  
answer denying the necessity of his attorney to take such an  
agreement, and setting up the defense of fraud as a defense.  
Issue was joined on the question of the answer, and the  
cause was referred to the master in equity, who filed a re-  
port finding the alleged agreement was valid in the absence of  
fraud and was enforceable. Appellee's objections to the re-  
port were ordered to stand as exceptions, and the cause was  
taken under advisement.

While the cause was still pending, appellee respec-  
tively instituted and answered appellant on two notes, with-  
out any reference to the pending action. Later, on November

in the complaint in the original suit was filed, alleging  
demands for the payment of the notes, the threatening of  
harassment, and that appellant employed his attorney to re-  
sist him in the settlement and adjustment of existing accounts  
between him and appellee, and to avoid litigation in respect  
to the payment of the notes; that on March 20, 1905, appellee  
and his attorney contacted appellee and entered into a settle-  
ment agreement, reciting the agreement in substantially the  
same terms as set out in the original complaint, except that  
the amendment alleges the 8000 shares were to be assigned to  
the plaintiff, and that the \$250.00 was to be paid by the

plaintiff; that appellant, through his attorney, B. Jay Noyes,  
designated the Illinois National Bank and Trust Co. as the  
place of deposit of the \$250.00 and the notes, and agreed to re-  
ceipt delivery to the bank, as appellant's agent, and a settle-  
ment of said account; that appellee had fully complied with  
the agreement, and that appellant, through his agent, the bank,



had accepted the deposit and a part of such notes and cash in settlement of his accounts with appellees, and had actually received the same, but refuses to perform his part of the agreement.

Appellant's motion to strike the amendment was overruled, and he answered, specifically denying that he employed his attorneys to represent him in the settlement and adjustment of any accounts existing between him and appellees, denying the existence of any account to settle between them; denying that his attorneys had any authority to enter into any settlement agreement with appellees; denying that he authorized any such agreement, or that he had any knowledge of any settlement agreement; and again setting up the Statute of Frauds as a defense. Appellees replied, denying the agreement was in violation of the Statute of Frauds.

The trial court sustained appellees' exceptions to the master's report, the three causes were consolidated, and on the hearing the court entered the decree appealed from, granting the relief prayed by appellees, and dismissing the counter claim.

The grounds urged for reversal are that the decree is contrary to law, in that it orders specific performance of an alleged agreement which is executory, which is within the restrictions of the Statute of Frauds, and the terms of which are uncertain, indefinite, doubtful, and lack mutuality; that the record fails to disclose by a preponderance of the evidence that appellant authorized his counsel to accept appellees' proposal; and that the trial court erred in allowing his counsel to testify. On the ground that the counter-claim rests solely on the decision concerning his ownership of the stock, appellant makes no argument as to the dismissal thereof.



had accepted the draft and a copy of such report was sent to  
attorney of the company with appeal, and had actually  
received the same, but refused to perform his duty in the  
same.

Appellant's motion to strike the statement was overruled.  
and he answered, specifically denying that he employed the  
attorney to represent him in the settlement and adjustment of  
any accounts existing between him and appellee, denying the  
existence of any account to settle between them; further that  
his attorney had no authority to enter into any settlement  
agreement with appellee; denying that he authorized any such  
agreement, or that he had any knowledge of any settlement  
agreement; and again stating to the State of Texas as a  
defendant. Appellee replied, denying the agreement was in  
violation of the State of Texas.

The trial court sustained appellee's exception to the  
master's report, the first cause was dismissed, and on  
the hearing the court entered the lesser verdict from, grant-  
ing the relief prayed by appellee, and dismissed the counter-  
claim.

The grounds urged for reversal are that the decree is  
contrary to law, in that it orders specific performance of an  
alleged agreement which is void, which is against the con-  
stitution of the State of Texas, and the laws of said State  
unwritten, legislative, judicial, and local authority; that the  
second trial is disallowed by a preponderance of the evidence  
that appellee authorized the removal of goods and chattels  
therefrom; and that the trial court erred in allowing the decree  
to testify. On the ground that the court erred in allowing the decree  
on the motion concerning the removal of the stock, appel-  
lant urges no argument as to the dismissal thereof.

Appellees urge that the oral agreement was fully performed on their part, and is binding as a mutual settlement agreement; that it is not within the Statute of Frauds, for the reason that the buyer (appellees) accepted part of the goods or choses in action contracted to be sold, and, already having possession of a major part thereof, actually received the same, assenting to becoming the owner, and gave the check for \$2800.00 in earnest to bind the contract; that appellant's attorneys were authorized to make the contract and were competent witnesses; that awarding specific performance is within the sound judicial discretion of the court; and that the decision of the trial judge is in accordance with the weight of the evidence, and is entitled to as much weight as the verdict of a jury on controverted questions of fact.

Appellant was an employee and an officer of the corporation from 1916 to 1930, and from time to time purchased stock therein. His \$9000.00 note to the corporation was originally made for the purchase of 90 shares of the par value of \$100.00 each. That stock was issued in appellant's name. On December 31, 1929, appellant executed a \$2500.00 note to Mr. Anderson for the purchase price of 25 or more of such shares. Later the corporation changed its stock to ~~\$5.00 per share of~~ no par value, and a 100% stock dividend was declared.

On May 7, 1930, 2000 shares, in place of the 90 shares originally issued to appellant, were issued. Mr. Anderson testified the certificate was issued to him, and that he sold the 2000 shares to appellant, the certificate being held as collateral for the payment of the \$9000.00 note. On the same day, May 7, 1930, appellant executed a new note to Mr. Anderson for \$2500.00, due on 30 days demand, and 1000 shares of no par







value were issued in Mr. Anderson's name, and held by him as collateral for the payment of the last mentioned note. He testified that the prior \$2500.00 note was cancelled, but he retained possession of both notes, together with the certificate of stock for 1000 shares.

Some time prior to the alleged agreement, appellant employed Mr. Goembel to represent him concerning 600 shares of his stock, which had been sold by the receiver of a closed bank, and Mr. Goembel associated Mr. Knight to assist him in the case. In 1938 Mr. Knight represented appellant at a stockholders' meeting, and there appears to have been some meetings between the attorneys and appellees. On February 21, 1939, a written agreement was entered into between appellant and his attorneys for the payment to them by appellant of "the sum of 33 1/3% of any amounts recovered in stock or cash for my holdings." About one year prior to the alleged agreement, Mr. Anderson offered appellant's attorneys \$100.00 for his stock holdings, later increasing the offer to \$700.00, both of which offers included the cancellation of the notes, and both offers were rejected by appellant.

On March 16, 1940, Mr. Knight wrote the corporation, attention Mr. Anderson, that their letter of two days previous, concerning his notes, had come to his attention, and that he thought it would be well to have a meeting and talk the matter out, suggesting that their attorney contact him by March 22, 1940.

Mr. Knight testified that on March 26th or 27th, 1940, Mr. Anderson, accompanied by his son, came to Mr. Knight's office. Mr. Anderson testified that he made an offer for the

valuable issued to Mr. Anderson's name, and held by him as collateral for the payment of the last mentioned note. He testified that the prior \$2500.00 note was cancelled, but he retained possession of both notes, together with the certificate of stock for 1000 shares.

Just prior to the alleged agreement, appellant employed Mr. Goebel to represent him concerning 600 shares of his stock, which had been sold by the receiver of a closed bank, and Mr. Goebel associated Mr. Knight to assist him in the case. In 1938 Mr. Knight represented appellant as a stockholder's meeting, and there appears to have been some meetings between the attorneys and appellant. On February 21, 1939, a written agreement was entered into between appellant and his attorneys for the payment to them by appellant of "the sum of 33 1/3% of any amounts recovered in stock or cash for my holdings." About one year prior to the alleged agreement, Mr. Anderson offered appellant's attorneys \$100.00 for his stock holdings, later increasing the offer to \$200.00, both of which offers included the cancellation of the notes, and both offers were rejected by appellant.

On March 16, 1940, Mr. Knight wrote the corporation, attention Mr. Anderson, that their letter of two days previous concerning his notes, had come to his attention, and that he thought it would be well to have a meeting and talk the matter over, suggesting that their attorney contact him by March 21, 1940.

Mr. Knight testified that on March 23rd or 24th, 1940, Mr. Anderson, accompanied by his son, came to Mr. Knight's office. Mr. Anderson testified that he made an offer for the



stock by offering to cancel his note and the company's note and to make a cash settlement for \$2800.00, and that it included the proposal that all other shares of stock which were in appellant's name were to be turned over to him or to the company. Mr. Knight testified that Mr. Anderson said there were notes which the company held against appellant, one for \$9000.00 and a couple of other notes, and that if appellant "wants to take \$2800.00 and turn in the stock he has in the company and also endorse over another block of stock which he has never endorsed or which needs endorsement, I will pay that amount and we will cancel all of Mr. Larson's obligations to the company".

Mr. Knight further testified that he told Mr. Anderson that he would transmit the proposition to appellant, and afterward called appellant by telephone, told him of Mr. Anderson's proposition, and said that he would ask Mr. Anderson to put the money in the Illinois National Bank and Trust Co., and that appellant replied: "All right, I will be down to see you in the morning, and go ahead and call up Mr. Anderson and tell him the proposition is O.K."; that the next day appellant came to his office and a conversation ensued during which they were alone, until Mr. Knight called his stenographer in during the latter part of the conversation, to take down the subject matter of a written direction to him, and that he started to have it reduced to writing; that the witness made a memorandum in appellant's presence on a piece of yellow paper reading as follows: "2000 shares of stock to endorse 1400 shares endorsed Cancel--3 notes 1-9000 2-2500 Check for 2800", and said to appellant: "Now that's the proposition"; that appellant said: "Well, I don't know whether that is enough or not"; that the witness then said: "Well, that





is the proposition. It is up to you to say whether it is enough or not. Tell me what to do"; that appellant then asked: "Will the money be deposited in the bank so we will know there is no backing out?"; and that the witness then said: "Yes, we will make them take the money to the bank together with the notes and upon your making the necessary endorsements on the stock the notes and the \$2800.00 will be turned over to you." The abstract does not show any further conversation between them, except the stenographer's notes, which read:

Mr. Knight: "Swan Anderson took 2000 shares of stock left with Abegg, subject to your endorsing the stock and 1400 shares you are to bring in for endorsement, and upon your doing that, they will cancel three notes, one for \$9000.00, two for \$2500.00 and deliver check for \$2800.00. That is the set up. That is what has actually been left there, and that's the \$9000.00 that must have endorsements on it. That's the one that must have been paid on from time to time, is that right?" Mr. Larson: "Yes, that's reduced over half". Mr. Knight: "So that's how, and one of these \$2500.00 notes must have been nearly paid." The stenographer's testimony definitely fixes the date of this conversation as March 27, 1940. From Mr. Knight's statement to appellant that it was up to him to say whether the offer was enough and asking directions as to what to do, it is apparent that up to that time he did not consider he had any authority to accept the offer of appellees. There is no testimony that appellant told Mr. Knight what to do, or that he would accept the proposition. Appellant testified he suspected a trap and left the office immediately after the stenographer took a few notes. His testimony as to the time he left the office is corroborated by the stenographer, and is not contradicted by Mr. Knight's testimony that he did not



is the proposition. It is up to you to say whether it is  
enough or not. Tell me what you say; that is all I want to  
know. Will the money be repaid in the bank or will it be  
in a private bank? and that the witness says that, yes,  
it will be repaid in the bank or the bank together with the  
notes and upon your taking the necessary arrangements in the  
at of the bank and the witness will be turned over to you.  
The witness does not know any further conversation between them,  
except the elementary notes, which read:

Mr. Knight: "When I received from you \$100,000 I paid

it to the bank, subject to your order, in the bank and I  
showed you the bill for the same, and upon your taking  
that, they will cancel the notes, one for \$100,000, two for  
\$50,000 and deliver them for \$100,000. That is the set up.  
That is what has actually been said to me, and that is the  
fact that I have understood as is. That is the fact that  
I have been told on that time to date, is that right? No.

Witness: "Yes, that is correct over that." Mr. Knight: "You

think now, and one of these \$100,000 notes has been

replaced by the bank's testimony definitely, that

the case of this conversation as stated by you, is that

Knight's statement to the witness that it was up to him to say

whether the money was enough and making alterations as to what

to do, is it correct that up to that time he did not know

he had any authority to accept the offer of the witness. That

is the testimony that the witness told Mr. Knight what to do, or

that he would accept the proposition. The witness testified

that he was a man and left the office immediately after the

afternoon took a few notes. His testimony as to the time

he left the office is corroborated by the stenographer, and

is not contradicted by Mr. Knight's testimony that he did not



leave while the notes were being taken. He also testified that after March 30, 1940, he considered his attorneys dropped, and asked for the files, wanting to go somewhere else.

Mr. Knight further testified that after appellant left the office, he called Mr. Anderson and told him that appellant had said to go ahead with the deal; that he told Mr. Anderson to take the three notes and any stock he wanted endorsed, to the bank, with a check for \$2800.00, payable to appellant and his two attorneys. He also testified that he called Mr. Goembel and told him of Mr. Anderson's offer. When he did so is not shown by the record. He and Mr. Goembel testified that they had a meeting in Mr. Knight's office, but neither of them testified that appellant authorized either of them at that meeting to accept the offer of Mr. Anderson. Mr. Knight fixed the date of the meeting as in the two or three day period while the negotiations were going on.

Mr. Goembel's knowledge of the terms of the alleged agreement was derived from what Mr. Knight told him by telephone, the terms of which he did not remember on the trial. He testified that in either March or April, 1940 he had a conversation with appellant and had advised him to accept the proposition, and that appellant said he would do so; that he called Mr. Knight by telephone, and that it was his recollection that he sent appellant over to Mr. Knight's office; and that it was also his recollection that he communicated with the Andersons telling them the offer was accepted, but he did not testify positively that he did so. Mr. Anderson's testimony makes no mention of any such communication to him by Mr. Goembel, and both the complaint and the amended complaint base the action on an alleged contract through Mr. Knight only. Our conclusion is that Mr. Goembel was mistaken in his recollection in this respect.

leave with the notes and being taken. He also testified that after March 31, 1940, he considered the attorney's request, and asked for the files, wanted to go somewhere else.

Mr. Knight further testified that after appellant left the office, he called Mr. Anderson and told him that appellant had said he was asked with the deal; that he told Mr. Anderson to take the three notes and any stock he wanted included, to the bank, with a check for \$200.00, payable to appellant and his two attorneys. He also testified that he called Mr. Goebel and told him of Mr. Anderson's offer. When he did so he was not shown by the record. He and Mr. Goebel testified that they had a meeting in Mr. Knight's office, but neither of the testified that appellant authorized either of them at that meeting to accept the offer of Mr. Anderson. Mr. Knight fixed the date of the meeting as in the two or three day period while the negotiations were going on.

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Appellant denied having authorized either Mr. Knight or Mr. Goembel to accept the proposition, or having authorized either of them to designate the bank as escrow agent, or ever authorizing any deposit to be made there for him. He testified that at the conference in Mr. Knight's office in March, 1940, he told Mr. Knight he would not accept the offer; and that he had told him that on three separate occasions; that he had talked with both attorneys on several occasions before March 25th or 26th, 1940, but did not consult Mr. Goembel at any time concerning the offer in controversy which had been made by Mr. Anderson, and that he did not see him on March 27th, 1940. He also testified that at the time he declined to accept the \$100.00 offer, about March or April, 1939, he notified both Mr. Knight and Mr. Goembel in writing that they had no authority to make a deal for him; and that in May, 1939, he told them that he did not want any further meetings between them and Mr. Anderson unless he was present, and that at that time, submitted a memorandum confirming that instruction. Mr. Knight testified he had no recollection of any memorandum given him in March, 1939, and that on search of his files he found none, but he did not testify positively that no memorandum was given him, and Mr. Goembel did not testify about that matter.

On March 26, 1940, a letter signed "Anderson Bros. Mfg. Co. Swan F. Anderson, President", was written to "Mr. Eugene Abegg, Illinois National Bank & Trust Co." The letter read:

"Mr. G. A. Larson has asked through his attorney that we leave the following notes with you for collection.

One to Anderson Bros. Mfg. Co., dated Sept. 7, 1928, for \$9000.00.

One to Swan F. Anderson, dated May 7, 1930, for \$2500.00.

In payment of these two notes Mr. Larson is to sign stock certificate No. 23 for 2000 shares of Anderson Bros. Mfg. Co. Stock,





The following stock is to be purchased at the rate of \$2.00 per share:

Certificate	#18	-	200	shares
"	#19	-	400	shares
"	#20	-	200	shares
"	#21	-	600	shares
Total			1400	shares, amount \$2800.00"

The letter makes no mention of appellant's original \$2500.00 note to Mr. Anderson, and it makes no mention of the 1000 shares of stock for which the \$2500.00 notes were given.

This letter was dated on the day prior to the conversation between appellant and Mr. Knight, in which Mr. Knight testified he told appellant that the proposition was up to him, and asked appellant to tell him what to do. It therefore could not have been written by authority given Mr. Knight by appellant. It is also to be noted that it was addressed to Mr. Abegg, and there is no testimony or claim that he was to act as escrow agent.

Mr. Anderson testified that he had been exercising ownership of the 1000 shares of stock since May 7, 1930; that he had sold them to appellant on contract, and when the contract was not paid, he was not required to turn the stock over to appellant; and that the only written memorandum of the sale was the \$2500.00 note. No explanation is offered as to how he converted the type of his holding of the 1000 shares from a collateral holding to that of ownership of the stock. Manifestly he could not do so without crediting the note with the value of the 1000 shares at that time. (Levy v. Chicago National Bank, 158 Ill. 88.) But, so far as the testimony shows, he made no such credit. The agreement alleged by the complaint and the amendment thereto, did not embrace anything with relation to whether appellant's rights in the 1000 shares were to be surrendered, and the testimony is not clear in this respect. The memorandum on a piece of yellow paper written







by Mr. Knight makes no mention of the 1000 shares of stock, and it is not mentioned in the stenographer's notes, nor in the letter from the corporation to Mr. Abegg. Neither Mr. Anderson's nor Mr. Knight's testimony discloses whether Mr. Anderson or the corporation was to purchase the 1400 shares of stock. The letter to Mr. Abegg indicates that the corporation was to be the purchaser, but the check for the \$2800.00 purchase price was Mr. Anderson's personal check. Neither does the letter to Mr. Abegg indicate to whom the 2000 shares were to be assigned, and the testimony of both Mr. Anderson and Mr. Knight, as well as the memorandum prepared by the latter, is equally vague. The alleged agreement is not separable in its terms, and it is obvious that with such uncertainties existing, appellant could not maintain a suit for specific performance against appellees or either of them. The alleged agreement therefore lacked mutuality. Unless a contract can be specifically enforced as to all parties, equity will not interfere. (Winter v. Trainor, 151 Ill. 191, 195.) It is also well settled that to entitle a party to specific performance the contract must be clear and certain in its terms and be admitted or proved with a reasonable degree of certainty. (Gammon Co. v. Standard Trust and Savings Bank, 327 Ill. 489, 500; Sallo v. Boas, 327 id. 145, 150; Heroux v. Romanowski, 336 id. 297, 298.) The uncertainties mentioned are alone enough to defeat a claim for specific performance in this case. Furthermore, the letter to Mr. Abegg indicates that the original \$2500.00 note from appellant to Mr. Anderson was not sent with the letter, to be surrendered, as contemplated by the memorandum made by Mr. Knight, and therefore appellees did not show that they had performed their part of the alleged agreement, and are in no position to require specific performance by appellant.





Furthermore ~~for further reasons stated~~ there is no showing or claim that at the time of the alleged agreement, appellees, or either of them, owed appellant anything, or that appellant owed either of them anything, except the unpaid balance on the two notes given for the purchase of 2000 shares and 1000 shares, respectively, of stock in the corporation, and there is no showing that any account existed between them. The 1400 shares of stock were in no way involved with the debt on the notes, or with the other shares of stock. The letter to Mr. Abegg specifically states that the 1400 shares were to be purchased at \$2.00 per share. The claim that the alleged agreement was an executed settlement agreement of accounts existing between the parties is therefore without any foundation. It merely involved an alleged agreement by which one of the parties was to assign stock, and the other parties were to cancel notes and purchase stock, purely executory in character. The proposed purchase of the 1400 shares was part and parcel of the alleged agreement, not separable from the other parts of it. It involved more than \$500.00 as the purchase price, and being verbal, was within the Statute of Frauds, (Ill. Rev. Stat. 1943, chap. 121 $\frac{1}{2}$ , par. 4).

The exceptions in that section where a buyer accepts part of the goods or choses in action contracted to be sold, and actually receives the same, or gives something in earnest to bind the contract, or in part payment, manifestly have no application here. The 2000 shares were held by appellees, or one of them, as collateral, and by the terms of the letter to Mr. Abegg, to be accepted, required appellant's assignment. That position was not changed, and therefore there was no acceptance by appellees. They cannot rely upon their possession as manifesting acceptance, for the reason that their suit seeks assignment of the stock by appellant. And it is the

[illegible]



rule of law that the intent to deliver must be mutual. Neither party alone can effect a delivery and acceptance. (Illinois Meat Co. v. American Malt and Grain Co., 229 Ill. App. 311; Chicago Metal Refining Co. v. Jerome Trading Co., 218 id. 333.) Otherwise a bailor would be at the mercy of his bailee. As to the claim that the \$2800.00 check was a payment, within the terms of the exception in the statute, it was not accepted by appellant. Whether the bank was selected by appellant's attorney, or by appellees, as escrow agent, is immaterial. The papers were sent to Mr. Abegg by the corporation, or by appellees, who thereby selected him as its or their agent, and were therefore never out of the control of the corporation or Mr. Anderson personally. The same is true of the notes, which were not cancelled, but, with the check, were produced by appellees intact at the trial. The statutory exception as to payment of earnest money, or part payment, has no application here. From Mr. Knight's attempt to secure written directions to him from appellant, it is apparent that he felt the necessity therefor. Gradle v. Warner, 140 Ill. 123, and other cases relied upon by appellees, where the party to be charged had signed an agreement, or where the claimant had completely performed his part of a contract, are not in point.

Our conclusion is that the alleged agreement was wholly executory, and was not a settlement of any existing account between the parties; that it was so uncertain and indefinite that there was never a meeting of the minds of the parties; and on account of its uncertainty and indefiniteness, it cannot support an action for specific performance; and further, that it was clearly within the Statute of Frauds. It is obvious that the doctrine that awarding specific perform-

rule of law that the intent to deliver was not intended. (Illinois)

party alone can effect a delivery and acceptance. (Illinois)

West Co. v. American Bell and Texas Co., 222 Ill. App. 311;

Chicago Metal Working Co. v. George Trading Co., 218 Ill. App. 322.)

Operation of delivery would be at the mercy of his failure. As to

the claim that the \$200.00 check was a payment, within the terms

of the exception in the statute, it was not accepted by the

plaintiff. Indeed the bank was selected by defendant's attorney

next, in his reliance, as a reason why it is inadmissible. The

papers were sent to Mr. Abbey by the corporation, as by agreement,

who thereby selected him as its agent, and were

therefore never out of the control of the corporation or Mr.

Abbey personally. The same is true of the notes, which

were not cancelled, but, with the check, were received by

appellee intact at the trial. The statutory exception as

to payment of certain money, or bank deposit, does not apply

to this case. From Mr. Knight's attempt to secure written

directions to his firm cancellation, it is evident that he

felt the necessity therefor. Grille v. Barker, 140 Ill. 143,

and other cases relied upon by appellee, where the party to

be charged had signed an agreement, or where the claimant

had completely performed his part of a contract, are not in

point.

Our conclusion is that the alleged agreement was wholly

executory, and was not a settlement of any existing account

between the parties; that it was an uncertain and indefinite

that there was never a meeting of the minds of the parties;

and on account of its uncertainty and indefiniteness, it

cannot support an action for specific performance; and, for-

ther, that it was clearly within the Statute of Frauds. It

is obvious that the doctrine that forbids specific perfor-



ance is within the sound judicial discretion of the court does not apply to such cases. It is also the rule that it is only where the court has heard the evidence that a decree will not be distrubed unless it is against the weight of the evidence, and the rule is not applicable where the testimony is taken by the master in chancery. (Jones vs. Koepke, 387 Ill. 97, 107.)

Under these circumstances it is not necessary to consider other grounds urged for reversal. Another trial could not obviate the material difficulties, and there is therefore no occasion to remand the cause. The decree is accordingly reversed.

Decree reversed.





Abstract

GEN. NO. 10019

AGENDA NO. 15

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A.D. 1945.

D. T. SMILEY,

Appellant,

vs.

SAMUEL CARSON,

Appellee.

326 I.A. 82<sup>2</sup>

APPEAL FROM THE COUNTY COURT  
McHENRY COUNTY.

HUFFMAN, J.

This is an action by appellant to recover for attorney fees alleged to be due from appellee. They are claimed to have arisen by virtue of services rendered by appellant on behalf of appellee in and about securing his release from the asylum and order of restoration. The State Bank of Woodstock became a party to the proceedings by virtue of the fact that it was made garnishee. On motion of the parties-defendant, the petition of appellant was dismissed, and appeal from such order of dismissal with judgment for defendant, has been brought to this court.

The abstracts and briefs are far from enlightening as to the relationships between the parties with respect to the mat-

Abstract

ADDITIONAL NO. 10

NOV. 10, 1945

THE STATE OF ILLINOIS

IN SENATE

JANUARY 10, 1945

8561A-2

REPORT OF THE COMMISSIONER OF THE STATE DEPARTMENT

P. T. CANNON

MEMORANDUM

TO :

THE SENATE

FROM :

RE :

That in an effort to determine the extent of the activities of the various groups and individuals who are active in the State of Illinois, the Commission has conducted a thorough investigation of the same. The results of this investigation are set forth in the report which is being submitted to the Senate. The Commission has found that there is a large number of individuals and groups who are active in the State of Illinois, and that many of these are engaged in activities which are of a subversive nature. The Commission has also found that there is a large number of individuals who are active in the State of Illinois, and that many of these are engaged in activities which are of a subversive nature. The Commission has also found that there is a large number of individuals who are active in the State of Illinois, and that many of these are engaged in activities which are of a subversive nature.

The Commission has also found that there is a large number of individuals who are active in the State of Illinois, and that many of these are engaged in activities which are of a subversive nature. The Commission has also found that there is a large number of individuals who are active in the State of Illinois, and that many of these are engaged in activities which are of a subversive nature.



ters in controversy. The brief for appellee is wholly inadequate and complies with no rule of this court in any respect. After such consideration of the case as is available to us, we are of the opinion the petition of appellant is sufficient to have required answer thereto.

The judgment is therefore reversed and the cause remanded.

Reversed and remanded.



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Gen. No. 10009.

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Agenda No. 7.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
FEBRUARY TERM, A. D. 1945.

Louis Meppen, Individually, and Louis )  
Meppen, Executor of Last Will and )  
Testament of Wilhelmina Meppen, De- )  
ceased, )  
Appellees, )  
vs. )  
Appeal from  
Circuit Court  
Lee County.  
Arthur Meppen et al., )  
Appellant. )

WOLFE,-- J.

Louis Meppen, in his own right, and Louis Meppen as executor of the last will and testament of Wilhelmina Meppen, deceased, filed a complaint in the circuit court of Lee County, Illinois, for partition of certain lands in said county. Arthur Meppen, William Meppen, Lucy Wadsworth, H. L. Wadsworth, Olive Meppen, Jessie Meppen, Olive Hart Meppen, Alice Meppen and Martha Meppen, as heirs of Wilhelmina Meppen, were made parties defendant to the suit, as were Louis Pitcher, Dement Schuler and Leonard G. Rorer, trustees of the City National Bank of Dixon, Illinois.

The complaint alleges that Louis Meppen is entitled to an undivided one fourth of the premises; that Arthur Meppen is



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entitled to an undivided one fourth thereof; that Lucy Wadsworth is entitled to an undivided one fourth thereof, subject to the claim of Louis Meppen as executor of the last will and testament of Wilhelmina Meppen, deceased, on her note for the sum of \$3,900.00 (secured by trust deed); that William Meppen is entitled to an undivided one fourth thereof, subject to the balance due on his note of \$1,200.00 and subject to a certain mortgage dated January 17, 1928, given to secure Alice Meppen against loss because of having signed a note of said William Meppen to the City National Bank of Dixon, Illinois, as surety for the sum of \$1,475.00 and subject also to the lien of a judgment entered in the circuit court of Lee county, Illinois, on September 10, 1938, in favor of Louis Pitcher, Dement Schuler and Leonard G. Rorer, trustees of the City National Bank of Dixon, Illinois, a corporation, against W. H. Meppen and Alice Meppen for the sum of \$1,175.06.

The complaint further alleges that said William Meppen is insolvent and said indebtedness to the estate secured by his note was an advancement, and the county court had so decided; that the share of Lucy Wadsworth in the assets of the estate of Wilhelmina Meppen is insufficient to offset her liability on her said note and the share of William Meppen in said assets is insufficient to offset his said indebtedness to said estate.

The plaintiffs pray for the partition of said real estate and that the indebtedness of William Meppen be declared to

...and that the Government will not be able to



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be a first lien upon his one-fourth interest, and prior and superior to, the lien of the judgment in favor of said Louis Pitcher et al., trustees, etc., and that upon a sale of said property the share of William Meppen shall be paid to Louis Meppen, as executor, to be administered in the county court, etc., and for general relief.

Louis Pitcher, Dement Schuler and Leonard G. Rorer, trustees, as aforesaid, appeared and moved, that the complaint of Louis Meppen, as executor of the last will and testament of Wilhelmina Meppen, deceased, be stricken and that he be dismissed as a party to this suit.

The court on July 17, 1943, ordered that the complaint of Louis Meppen, as executor of the last will and testament of Wilhelmina Meppen, deceased, be stricken and that he be dismissed as a party to this suit. From this order, Louis Meppen as executor, perfected an appeal to this Court. We there held that the interest that William takes in his mother's estate is subject to a lien of the debt he owed on the estate, and the estate had a prior claim for the payment of the debt before a judgment creditor could have any claim against his share in the estate. We reversed and remanded the case to the trial court. Meppin vs. Meppin, 321 Ill. App. page 566.

The trial court redocketed the case and entered a decree in conformity with the finding of our Court. Evidence was heard and a decree of partition entered, and a sale of the



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property ordered. It is from this decree that the appeal is prosecuted to this Court.

The appellees made a motion to dismiss this appeal. The motion was taken with the case after full consideration of the motion to dismiss, and the same is hereby denied.

In our former opinion we used this language: "The only question for our consideration is whether the trustees of the City National Bank of Dixon, Illinois, because of the judgment which they had procured against William Meppen in 1938, have a prior claim on William Meppen's interest in the estate of his deceased mother, or whether the executor of the estate of Wilhelmina Meppen should first be paid the indebtedness which is owed by William Meppen to the estate, or should be deducted or charged against William Meppen's share in his mother's estate. It is insisted by the appellant that the executor has an equitable lien on the real estate devised to one who is indebted to an estate, and such lien is prior and superior to a lien of a judgment in favor of a creditor of such devisee, irrespective of the date of the judgment."

Exactly the same question is raised in this appeal, as in the former one. Questions of law, which have been decided by an Appellate Court on the appeal of a case, will not be again considered on the second appeal, and the decision on the appeal is binding, not only on the trial court in the further progress of the case, but also on the appellate tribunal in any subsequent appeal. *People vs. Militzer*, 301 Ill. 284. We reaffirm what we said in our former decision. *Fleming vs. Yeazel*, 379 Ill. page 343. The decree of the trial court is hereby affirmed.

Decree Affirmed.



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Extract

~~STATE OF ILLINOIS~~  
~~APPELLATE COURT~~  
~~THIRD DISTRICT~~

General No. 9446

~~Agenda No. 2~~

BANKERS LIFE COMPANY, a Corporation,  
for the Use of CONTINENTAL CASUALTY  
COMPANY, a Corporation,

~~Plaintiff~~ Appellant,

v.

UNION AUTOMOBILE INDEMNITY ASSOCIA-  
TION,

~~Defendant~~ Appellee.

~~Appeal from~~  
~~McLean County~~  
~~Circuit Court.~~

326 I.A. 83<sup>2</sup>

Mr. Presiding Justice Riess delivered the opinion of the Court.

Suit was filed by Plaintiff-Appellant, Bankers Life Com-  
pany, as nominal Plaintiff, for the Use of Continental Casualty  
Company, against Defendant-Appellee Union Automobile Indemnity  
Association to recover damages alleged to have been sustained as a  
result of defendant's failure to furnish legal defense to the Plain-  
tiff-Appellant in a prior suit by one Charles Truex seeking re-  
covery of damages in the sum of \$10,000 against Frank G. Snider, an  
alleged agent of Plaintiff-Appellant, in the Superior Court of Elk-  
hart, Indiana. Upon defendant-appellee's motion, the suit was dis-  
missed at plaintiff's costs for failure to state a cause of action,  
from which judgment on the pleadings, the Plaintiff has appealed to  
this Court.

The complaint alleged in substance that the Plaintiff, an  
Iowa corporation, was licensed to write life insurance in the State  
of Indiana and that on October 15, 1937, defendant was duly licensed  
in said State to write automobile and other insurance; that on or  
about April 20th of said year, defendant issued an automobile policy  
of insurance No. FF-1366 to Frank G. Snider of Elkhart, Indiana, in-  
suring said Snider against actual loss or expense from the liability  
imposed by law resulting from claims upon him by reason of the use,  
maintenance or operation of a 1936, six-cylinder Plymouth business  
coach, which policy limited defendant's liability to \$5000 for one  
person and \$10,000 for one accident; that it was further provided



Exhibit

General No. 2442

BANKERS LIFE COMPANY, a corporation,  
for the use of CONTINENTAL CASUALTY  
COMPANY, a corporation,

~~Plaintiff~~

v.

UNION AUTOMOTIVE INDUSTRY ASSOCIATION,  
Inc.,

~~Defendant~~

Mr. Justice Brandeis delivered the opinion of the Court.

This was filed by Plaintiff-appellant, Bankers Life Com-

pany, as plaintiff, for the use of Continental Casualty

Company, against defendant-appellee Union Automobile Industry

Association to recover damages alleged to have been sustained as a

result of defendant's failure to furnish legal defense to the latter

plaintiff-appellant in a prior suit by one Walter Frank seeking re-

covery of damages in the sum of \$10,000 against Frank G. Walter, an

alleged agent of Plaintiff-appellant, in the Superior Court of Wis-

consin, Indiana. Upon defendant-appellee's motion, the suit was dis-

missed as plaintiff's cause for failure to state a cause of action,

from which judgment on the pleadings, the Plaintiff has appealed to

this Court.

The complaint alleged in substance that the Plaintiff, an

insurance corporation, was licensed to write life insurance in the State

of Indiana and that on October 15, 1937, defendant was duly licensed

in said State to write automobile and other insurance; that on or

about April 30th of said year, defendant issued an automobile policy

of insurance no. 77-1355 to Frank G. Walter of Elkhart, Indiana, in-

cluding said policy against actual loss or expense from the liability

imposed by law resulting from claims upon him by reason of the use,

maintenance or operation of a 1936, six-cylinder Plymouth business

coach, which policy limited defendant's liability to \$5000 for any

person and \$10,000 for one accident; that it was further provided



under the head of "Additional Protection" that defendant agreed to investigate all reported accidents covered by the policy and to defend for and in the name of the assured any suits, even if groundless, against the assured for damages in any civil action covered by the policy and pay all expenses incurred in such investigation or defense; that by the terms of the policy under the heading of "General Conditions" its provisions were extended to cover as an additional assured any person while operating such automobile so covered by said policy and any firm or corporation legally responsible for its operation where the disclosed and actual use of said automobile is for "pleasure and business" or "commercial" purposes as defined in the policy; that on or about March 6, 1937, the Continental Casualty Company issued its combination automobile policy of insurance No. 2310061 to plaintiff; that an Employer's Non-Ownership Liability Endorsement was attached to and made a part of said policy by which endorsement it was agreed between plaintiff and said Continental Casualty Company that the policy was extended to cover legal liability, subject to its limitations, as defined in the policy, of the plaintiff only, for damages arising out of accidents as a result of operation in plaintiff's business of any automobile or motorcycle of the private passenger type or in plaintiff's business by an employee of any motor vehicle of commercial type, provided such operation is occasional and not frequent, and provided the automobile or motorcycles of the private passenger type and commercial motor vehicles were not at the time of the accident (1) owned in whole or in part by the plaintiff herein, (2) hired or leased by the plaintiff herein, (3) registered in the name of the plaintiff herein; that the policy covered the liability of plaintiff from March 6, 1937 to March 6, 1938; that the limits of liability of the Continental Casualty Company was \$25,000 for each person and \$50,000 for each accident. The provisions of the policy in reference to other valid and collectible insurance were eliminated as respects the coverage provided by the endorsement and if there existed at the time of the accident any insurance taken out or effected on behalf of anyone other than the plaintiff, under the terms of which plaintiff was entitled

under the date of "Additional Provision" that defendant agreed to  
investigate all reported accidents covered by the policy and to de-  
fend for and in the name of the assured any suits, even if it should  
appear the assured for damages in any civil action covered by the  
policy and pay all expenses incurred in such investigation or defense;  
that by the terms of the policy under the heading of "General Pro-  
visions" the provisions were extended to cover as an additional insured  
any person while operating such automobile as covered by said policy  
and any firm or corporation legally responsible for the operation  
where the assured was acting as an authorized driver for "clearance  
and release" or "commercial" purposes as defined in the policy; that  
on or about March 6, 1937, the Continental Casualty Company issued its  
automobile liability policy of insurance No. 2310001 to plaintiff;  
that an employer's non-ownership liability endorsement was attached  
to and made a part of said policy of which endorsement it was agreed  
between plaintiff and said Continental Casualty Company that the policy  
was extended to cover legal liability, subject to its limitations, as  
defined in the policy, of the plaintiff only, for damages arising  
out of accidents as a result of operation in plaintiff's business of  
any automobile or automobiles of the private passenger type or in  
plaintiff's business by an employee of any motor vehicle of commercial  
type, provided such operation is occasional and not frequent, and pro-  
vided the automobile or automobiles of the private passenger type and  
commercial motor vehicles were not at the time of the accident (1)  
owned in whole or in part by the plaintiff herein, (2) hired or leased  
by the plaintiff herein, (3) registered in the name of the plaintiff  
herein; that the policy covered the liability of plaintiff from March 6,  
1937 to March 5, 1938; that the limits of liability of the Continental  
Casualty Company was \$25,000 for each person and \$50,000 for each  
accident. The provisions of the policy in reference to other valid  
and collectible insurance were eliminated as respects the coverage  
provided by the endorsement and it was agreed at the time of the  
accident any insurance taken out or effected on behalf of anyone other  
than the plaintiff, under the terms of which plaintiff was entitled



to protection and coverage, then the coverage provided by endorsement shall only be excess insurance over and above the amount of such other valid and collectible insurance; that on or about June 29, 1939, a complaint for \$10,000 damages was filed in the Superior Court of Elkhart, Indiana, by above Charles Truex, as plaintiff against said Snider and the plaintiff herein as defendants, which complaint was amended on November 7, 1941; that said suit was predicated upon the theory that defendant Snider was at the time acting as agent, servant or employee of the plaintiff herein and was then driving said 1936 Plymouth business coach in the scope of his employment as such agent; that said complaint, if true and proven established a case of liability against plaintiff herein; that under provisions of defendant's policy in paragraph six thereof, plaintiff, upon filing said complaint became an additional assured under defendant's policy and was obligated to defend the suit for and in the name of plaintiff even if said suit was groundless; and that said obligation to defend said suit was primary and direct; that the policy of said Continental Casualty Company to plaintiff became and was excess insurance over and above the amount of insurance afforded by defendant's policy so issued by it to Snider; that the automobile driven by Snider at the time of the accident was not owned in whole or in part by plaintiff herein or hired or leased by or registered in his name; that by letter dated March 16, 1940, plaintiff demanded that defendant defend the Truex suit on behalf of this plaintiff and called defendant's attention to said existing policy with Snider and its alleged obligation under said policy to defend the suit on behalf of plaintiff but that defendant refused to defend the plaintiff herein and that thereby Continental Casualty Company, as insurance carrier for the plaintiff under its policy became obligated to defend and did defend plaintiff in that suit which was tried in the Superior Court of Elkhart, Indiana, and resulted in a verdict in favor of the plaintiff herein and against said Snider; that an appeal from said judgment was taken to the Appellate Court of Indiana by plaintiff Truex, the appeal being entitled "Frank G. Snider v. Charles L. Truex and Bankers Life Company of Des Moines, Iowa"; that as result



[illegible]

of such appeal, Continental Casualty Company became obligated to file a brief on plaintiff's behalf and did file such brief in said appeal case; that said company was forced to expend \$993.27 for costs and attorneys' fees in defense of said suit together with \$17.30 for costs and attorneys' fees on account of filing the brief in said Appellate Court on behalf of this plaintiff; that under the terms of the policy issued by said Continental Casualty Company to the plaintiff said company was subrogated to all the rights of recovery of plaintiff herein to recover any payment made under said policy. Judgment in the sum of \$1,010.57 together with costs and attorneys' fees was sought to be recovered from the defendant for the Use of said Continental Casualty Company. Copies of the policies in question were attached as exhibits to the amended complaint. A motion to strike a number of paragraphs of the complaint was filed by the defendant on the grounds that complaint nowhere alleges that defendant Union Automobile Indemnity Association was legally responsible for the operation of the Snider car at the time and place of injury complained of in the suit therein referred to. The Trial Court, on March 4, 1944, entered an order finding that it had jurisdiction of the parties and subject matter; that the matters set forth in the motion to strike and for Judgment by the defendant are true; that because of the failure of plaintiff to allege that it was legally responsible for the operation of the Snider car at the time and place of injury complained of and referred to in numerous paragraphs therein, the complaint fails to state a cause of action against the defendant and defendant's motion is granted and the complaint stricken and suit was dismissed at plaintiff's cost.

Among other provisions, the policy No. FF-1366 provided under Subdivision II "Against actual loss or expense of the Assured from the liability imposed by law, arising or resulting from claims upon the Assured by reason of the use, maintenance or operation of the automobile described herein;" that the Additional Protection clause of the policy provides "Investigation and Defense: The Association agrees to investigate all reported accidents covered hereby; to defend







for, in the name of the assured, any suits, even if groundless, brought against the assured to recover damages under any civil action covered herein, and to pay all expenses incurred by the Association for such investigation or defense;" that under the heading General Conditions, the policy further provided as follows: "Additional Assured: This policy is extended to cover as an additional assured any person while operating any automobile described in the Declaration or any person, firm or corporation legally responsible for its operation, where the disclosed and actual use of the automobile is for 'Pleasure and Business' or 'Commercial' purposes as herein defined and the automobile is being so used with the permission of the named assured, or if the named assured is an individual with the permission of any member of the assured's household (over twenty-one years of age) other than a chauffeur or domestic servant. Provided, however, (1) that this extension of the policy shall not enure to the benefit of an automobile sales or service agency or garage of any description or parking station, or the agents or employees thereof; (2) that the insurance under this policy shall be available first to the named assured, and the remainder, if any, to other persons entitled to the benefits hereunder; (3) that the defenses of the Association against the named assured shall be available to it against any additional assured included hereunder."

The endorsement in policy CA-2310061 issued by Continental Casualty Company to the Bankers Life Company under date of February 23, 1937, provided in an endorsement that "The provisions of this policy in reference to other valid and collectible insurance are hereby eliminated as respects the coverage provided by this endorsement and, it is agreed that if there exists, at the time of the accident, any insurance taken out by or effected on behalf of any one other than the named Assured, under the terms of which the named Assured is entitled to protection and coverage, then the coverage provided by this endorsement shall be excess insurance over and above the amount of such other valid and collectible insurance." A certified copy of the complaint in the Indiana suit was attached as Exhibit 3. Defendant's motion to



For, in the event of the insured, any claim, even if Groundwater, brought  
against the insured to recover damages under any civil action covering  
accident, and to pay all expenses incurred by the Association for the  
investigation or defense; "The insured agrees to assign to the Association  
the policy further provided as follows: "Additional Assured: This  
policy is intended to cover an additional insured any person who  
operating any automobile described in the policy or any person,  
firm or corporation legally responsible for the operation, where the  
insured and actual use of the automobile is for "Personal and household"  
or "Domestic" purposes as herein defined and the automobile is  
being used with the permission of the owner insured, or if the  
named insured is an individual, with the permission of any member of the  
insured's household (over 18 years of age) when such a  
member or someone serving. Provided, however, (1) that this as-  
signment of the policy shall not serve to the benefit of an automobile  
sales or service agency or holder of any description of parking, leasing,  
or the agent or employee thereof; (2) that the insurance shall not  
policy shall be available first to the named insured, and the Association,  
if any, to other persons entitled to the benefits hereunder; (3) that  
the defense of the Association against the named insured shall be  
available to it against any additional insured included hereunder."  
The endorsement in policy CA-20000 issued by Continental Casualty  
Company to the Bankers Life Company, dated date of February 22, 1937,  
provided in an endorsement that "The provisions of this policy in  
reference to other valid and enforceable insurance are hereby elimi-  
nated and replaced the coverage provided by this endorsement and, it is  
agreed that if there exists, at the time of the accident, any insurance  
taken out by or effected on behalf of any one other than the named  
insured, under the terms of which the named insured is entitled to  
protection and coverage, that the coverage provided by this endorsement  
shall be excess insurance over and above the amount of such other valid  
and enforceable insurance." A certified copy of the complaint in the  
Indemnity suit was attached as Exhibit C. Defendant's motion to

strike and for judgment filed by the Union Automobile Indemnity Association moved to strike said numerous paragraphs as hereinabove recited for reason that the complaint nowhere alleges that it was legally responsible for the operation of the Snider car at the time and place of the injury complained of in the suit referred to, which motion was granted and plaintiff's suit dismissed and the appeal to this Court was perfected as hereinabove recited.

Appellant contends that since Truex charged that Snider was an agent of the Bankers in operating the car at the time of the accident, the Union Automobile Indemnity Association was obliged under the terms of its policy to defend the suit of the Bankers because of its policy clause contending that its policy would cover an additional assured, "any person, firm or corporation legally responsible for its operation if such operation was with the permission of the named assured, etc." Defendant's motion pointed out that the plaintiff bases its right of recovery on the theory that Bankers was covered by the clause protecting those who were "legally responsible for the operation of the car" which allegation was necessary in order to bring Bankers within the plain terms of the policy. The Continental further contends that the policy was effective "on behalf of any one other than the named Assured, under the terms of which the named Assured is entitled to protection and coverage, then its coverage should be excessive insurance, etc.," but also contends that the provision in the Union's policy to Snider provided that "no recovery shall be had under this policy if, at the time the loss occurs, there shall be any other insurance, whether such other insurance be valid and/or collectible or not, covering such loss, which would attach if this insurance had not been effected" should be wholly ignored, notwithstanding it admits it was bound under its policy to defend the claim. By this means they seek to bring about a situation where the Continental would be entirely relieved from responsibility which would be placed upon a company to receive no premium for coverage and its policy expressly provided it would



The court in *Barber* found that the defendant's negligence was the proximate cause of the injury and that the defendant was liable for the injury. The court also found that the defendant was liable for the injury because the injury was a direct result of the defendant's negligence. The court further found that the defendant was liable for the injury because the injury was a direct result of the defendant's negligence.

not extend coverage to persons or firms already covered by insurance against the claim sued on.

Appellee contended that the judgment should be affirmed because the Bankers Life Company was, under no circumstances an additional assured under the policy of the Union Automobile Indemnity Association for the reason that it was expressly excluded from said coverage as it had other insurance covering the accident; that it could not claim protection under the Snider policy clause extending protection to a firm or corporation "legally responsible for the operation of the car" and at the same time deny that legal responsibility; that the Continental Casualty Company was obliged in any event to defend the Bankers Life Company because the claim made against Bankers Life Company was far in excess of the limitation of the policy issued by the Union Automobile Indemnity Association to Snider; that in event there was a joint obligation of the two companies to defend the Bankers Life Company upon the theory the latter was "legally responsible" then by the terms of the Union policy, under which they seek to recover, Continental became liable for five-sixths of all of the expenses, including the amount of the judgment recovered; that under no circumstances could the Continental Casualty Company claim that the Bankers Life Company was within the terms of the Union Automobile Indemnity Association policy without alleging that Bankers Life Company was legally responsible for the operation of the car.

The beneficial plaintiff herein was the Continental Casualty Company. While an insurance policy is to be construed most favorably to the insured, it is equally true that no strained or unwarranted construction is to be adopted which is plainly not within the terms of the instrument. *Soukup v. Halmel*, 357 Ill. 576; 192 N. E. 557. It was necessary for the plaintiff to allege and prove as a basis for its cause of action that the Bankers Life Company was legally responsible for the operation of the Snider car. *Soukup v. Halmel*, supra. No Illinois case is cited by appellant extending or denying



8 JAN 1954

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tion for the reason that it was extremely difficult to cover the  
at least about the middle of the month of March 1941.

There was a total obligation of the two nations to defend the Union insofar as the security of the Union was concerned. The Union was not in existence at the time of the policy of the two nations. The two nations were not in existence at the time of the policy of the two nations. The two nations were not in existence at the time of the policy of the two nations.

Life expectancy was largely responsible for the variation of the  
mobile insurance Association policy which allowed that persons  
over the age of 65 were eligible for the same rate of premium as  
under 65. The Association would not have been able to do this  
under no circumstances would the Association have been able to do this  
of low expense, including the amount of the judgment rendered; and  
seen to recover, substantial damage liable for the entire of all  
responsibility, they by the terms of the Association, under which they  
- Bankers Life to pay upon the death of the insured, the family re-

of the instrument. *Smith v. Baker*, 282 Ill. 60; 100 F. 2d 107.

[illegible]

coverage to an employer or principal as an additional assured under the terms of the stock coverage found in these two policies. In passing upon the allegations of the complaint, only facts well pleaded will be considered and on motion to strike or dismiss, the conclusions of the pleader therefrom are not to be taken as admitted. The burden rested upon plaintiff to allege and show that defendant was covered by the terms of the policy. It does not appear that the plaintiff was covered by the additional assured clause of the policy. Unless plaintiff alleged that it was legally responsible and had no other coverage there would be no protection under the defendant's policy and the question arises as to whether the Bankers Life Company did have any coverage at all under the Union Automobile Indemnity Association policy. The Bankers Life was covered by a policy with the Continental Casualty Company whose duty it was to defend. The defendant has no ground for complaint because he was defended by the company which insured him. The Continental Casualty Company has no legal grounds for complaint. It received premiums for assuming the responsibility of protecting the Bankers Life Company and had a policy sufficient to cover the claim of the Truex suit. We cannot construe the two policies to mean that it was the duty of the Union Automobile Indemnity Association to defend an action and plead on behalf of the Bankers Life Company that it was not legally responsible for the operation of the car at the time and thus remove the only ground for interposing any suit at all and particularly in view of the fact that it would be to the advantage of the Union Automobile Indemnity Association to have the Continental Casualty Company admit that the Bankers Life was legally responsible for operation of the car. If this were contended by the defendant-appellee herein the Continental Casualty Company would be liable under the terms of the Union Automobile Indemnity Association policy to pay five-sixths of the expenses, judgment, interest and costs.

From a consideration of the plaintiff's amended complaint and exhibits attached thereto, considered in the light most favorable



covered to an employer or official as an additional security matter.  
The terms of the above contract found in these two exhibits. In  
passing upon the allegations of the complaint, only those well  
founded will be considered and on motion for writs of habeas corpus,  
the petitioners of the above petitioners are not to be taken as admitted.  
The burden rested upon plaintiff to allege and show that defendant  
was covered by the terms of the policy. It does not appear that  
the plaintiff was covered by the additional insured clause of the  
policy. Unless plaintiff alleged that it was legally responsible  
and had no other coverage except would be no question under the  
defendant's policy and the question arises as to whether the plaintiff  
knew or may did not know and covered or not under the above insurance  
policy. The defendant's policy was covered by a  
policy with the Continental Casualty Company which was in force to  
defend. The defendant was not given for consideration because in the  
statement of the company was found that the Continental Casualty  
Company was no legal ground for consideration. It is stated that  
the company was responsible for providing the plaintiff with the  
policy and had a policy which was not the basis of the claim and  
the company covered the two policies in such that it was not only of  
the Union Automobile Liability Insurance Company to defend and indemnify  
himself as well as the plaintiff's life company and it was not legally  
responsible for the payment of the sum of the fine and that neither  
the only ground for considering was that it was not particularly in  
view of the fact that it would be to the advantage of the Union  
Automobile Liability Insurance Company to have the Continental Casualty  
Company state that the plaintiff's life was legally responsible for  
payment of the cost. It was contended by the defendant-union  
that the Continental Casualty Company would be liable under the  
terms of the Union Automobile Liability Insurance policy in the  
event of the plaintiff's death, injury, sickness and costs.  
From a consideration of the plaintiff's motion, complaint  
and exhibits attached hereto, considered in the light of the law

to the plaintiff as to facts well pleaded and not as to conclusions, we find that the complaint is subject to the objection of defendant's motion to strike for failure to state a cause of action and that the motion was properly sustained by the Trial Court and the suit dismissed at the costs of plaintiff.

The judgment of the Circuit Court of McLean County is therefore affirmed.

JUDGMENT AFFIRMED.



to the plaintiff as to facts well known and not as to matters,  
we find that the complaint is proper in the subject of defendant's  
action is proper for failure to state a cause of action and that the  
motion was properly sustained by the Trial Court and the writ dis-  
missed as the writ of certiorari.  
The judgment of the Circuit Court at Boston should be affirmed.  
Dated at Boston, this 10th day of June, 1909.

Wm. J. Sullivan, Jr.

26 Feb 1945  
Clerk  
7-9-45

STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT

1693 A

February Term, A. D. 1945

Term No. 44024

Agenda No. 16.

LAZETTA GODFREY,

Plaintiff-Appellant,

vs.

ALBERT W. GODFREY,

Defendant-Appellee.

326 I.A. 250

Appeal from the

City Court of the

City of East St.

Louis, Illinois.

BRISTOW, P. J.

In 1935 Albert W. Godfrey, the present appellee, commenced an action for divorce in the City Court of East St. Louis, Illinois. Lazetta Godfrey, his wife and present appellant, filed an answer denying any charges of desertion, and also filed a cross complaint, praying for separate maintenance. The chancellor in that proceeding found against Lazetta on her cross complaint, dismissing it for want of equity, and found her guilty of desertion, and granted Albert W. Godfrey a divorce on his original bill.

In the decision rendered by this court in the case entitled Godfrey vs. Godfrey 284 Ill. App. 298, the decree of the City Court was reversed, and cause was remanded for new trial. Upon a retrial of this cause on November 4, 1939, the City Court of East St. Louis entered a decree finding Lazetta's husband to be living separate and apart from her without her fault and ordered Mr. Godfrey to pay his wife \$75.00 per month as separate maintenance.

On January 29, 1944 appellant filed her petition in the City Court of East St. Louis asking for modification of the separate maintenance decree and that appellee be required to pay her more





money. This petition contained the usual averments, namely, that her circumstances had changed so materially and in view of the increased cost of living, and her recent ill health, the monthly allowance of \$75.00 was inadequate, and that appellee was better able to pay. Appellee filed his answer to this petition denying generally all claims made by his wife. A hearing was had in the City Court upon this petition and answer, whereupon appellant's petition was denied. An appeal lands this dispute in this court for its second appearance.

The evidence on behalf of Lazetta Godfrey discloses that at the time of the original allowance of \$75.00 per month, she was living with one of two daughters who at that time was not married. Her name is Ilah Fay. Appellant and Ilah then lived on St. Clair Avenue, where the latter paid the rent. Ilah and her sister Olive owned an eating place in East St. Louis called "The Cars". Mrs. Godfrey was permitted to eat there without charge. It also appears that Ilah assisted in paying many of the necessary household expenses such as laundry, electricity and telephone. In May, 1943, Ilah was married and she and her husband resided in St. Louis, Mo. The girls, Ilah and Olive, sold their eating place "The Cars", consequently the assistance appellant received from her daughters was discontinued.

The evidence further discloses that Mrs. Godfrey, since the entry of the decree in 1939, has become afflicted with arthritis which causes pain in and affects the use of her knees and back; that for the past two years she has been under the care of Doctors Huber and Cannady; that their unpaid bills are \$39.00 and \$49.00 respectively.

Since 1943 appellant has resided in an apartment on Tenth Street where the monthly rental is \$45.00. It further appears,





without dispute, that her other necessary monthly items of expense are; electricity \$5.38; telephone \$3.50; laundry \$10.00; clothing \$25.00; food \$30.00. That alone totals about \$120.00. Then there is your doctors' bills, amusements, travel expense and many other items too numerous to mention. One must only live and not be blind to the truth to realize what it really does cost to live now-a-days. Mr. and Mrs. Godfrey had been accustomed to associating with the best people in East St. Louis and enjoying the pleasures and comforts of living that their friends enjoyed.

To further sustain her proof of right to relief, under Section 60, appellant called appellee and sought to question him about his present financial position. She had alleged in her petition that his total annual income was \$20,000; that he operated a large stock farm in Jersey County; that he is an officer in Robertson's Inc., which is a large general store in East St. Louis, and that as a stockholder in the corporation he derived \$12,000 per year income and that in addition he drew a substantial monthly salary and that he is well able to pay her \$200 per month. Under cross examination appellee was asked what his income was for 1943. He stated that he did not think he should answer that. Then he was asked what income tax he had paid for 1943 and he refused to answer, whereupon his counsel, Miss Connole, had the following to say, "Object to the question as immaterial. We haven't said he couldn't afford to pay what you are asking."

The defendant had very little to offer by way of defense. Mr. Godfrey complained that his wife was always picking on him; that she was continually embarrassing him by calling by telephone and approaching him personally, in the presence of friends, requesting more money and making threats that she would break him. When pressed on cross-examination to be specific about this as to





time and place and persons present, his memory wholly failed him.

Another circumstance that seemed to irk Mr. Godfrey is that his wife lives in a nice, five-room apartment, at the cost of \$45.00 per month, while he is contented to live in one room for which he pays only \$20.00 per month. The evidence discloses that Mrs. Godfrey rents one room for \$5.00 per week when she can find a tenant. At the time of the hearing there was a "Room for Rent" sign in the window. Let us quote from the argument made by Mr. Godfrey's attorneys in their printed argument: "About the only difference in the record of facts in the present suit from that originally given in support of the original decree is that the plaintiff now rents a five-room flat, maintains a notice in the window 'Rooms to Rent', and expects her husband to maintain her in that business. The law contemplates that the husband shall 'supply reasonable separate maintenance' for his wife, which would not include the conducting of a business and especially one that appears to be a loss. It is not necessary that the plaintiff go into business of renting property and expect the husband to maintain her in such business." The facts appearing undisputed in the record must be stretched clear out of shape to support such a feeble argument. Without prolonging this opinion unduly, suffice it to say that all the other defenses argued on behalf of the appellee are of the same weight and consequence.

We are of the opinion that the finding and decree entered herein are against the manifest weight of the evidence. We are convinced that Mr. Godfrey receives a large income and Mrs. Godfrey is entitled to a much larger allowance than she has been receiving. A citation of authorities is deemed superfluous to sustain this finding, but simple justice demands it.





The decree of the City Court of East St. Louis in this case is reversed and this cause is remanded to that court with directions to enter a decree allowing appellant petition.

Abstract.

**FILED**

May 5 1945

*Stanley R. Brown*

CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS



326 I.A. 251

43114

NATHAN H. GLASS, individually  
and doing business as 1st  
Mortgage Investment Company,  
Appellant,

v.

LIBERTY NATIONAL BANK OF CHICAGO,  
as Trustee under the provisions  
of the Trust Agreement dated  
November 30, 1940, and known as  
Trust No. 3190, MORRIS S. BROMBERG  
and CHARLOTTE BROMBERG,

Appellees.

APPEAL FROM CIRCUIT  
COURT, COOK COUNTY.

270

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

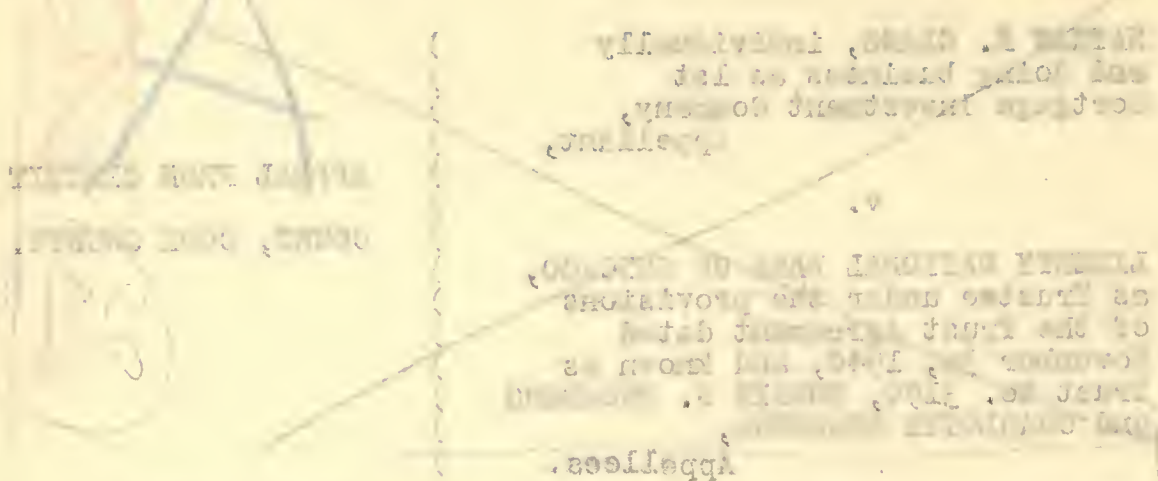
Nathan H. Glass, a real estate broker, brought suit against Morris S. Bromberg and others as owners of an apartment building, commonly referred to as the "Greenview and Schreiber" building, in Chicago, for commission on the sale of the building by Bromberg to Alfred L. Rouske, claiming that he had submitted the property by letter to Harold A. Fein, an attorney, at the latter's suggestion, for a client of Fein, and that the property was shortly thereafter sold directly by Bromberg to Rouske, Fein's client. Under a letter of indemnification given by the purchaser, Fein defended the action on behalf of his client. Trial by the court without a jury resulted in a finding and judgment for defendants, from which plaintiff has taken an appeal.

The apartment building, located at the southwest corner of Greenview and Schreiber avenues in Chicago, was acquired by Bromberg and others in 1940. The title thereto was placed in a trust with Liberty National Bank of Chicago, of which Bromberg became the sole beneficiary. Glass and other brokers were trying to sell the property for Bromberg and had obtained from him full data as to the condition of the building, its income and expenses, taxes, improvements and financial structure. Bromberg had known Glass for



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THE FOLLOWING IS A SUMMARY OF THE FACTS OF THE CASE:

Section 1. Class, a real estate broker, dealing with various forms of property and others as owners of an estate-land building, commonly referred to as the "Wormwood and Cemetery" building, in Chicago, for commission on the sale of the building by property to Alfred L. Wormwood, claiming that he had purchased the property by letter to Harold L. Wormwood, an attorney, as the latter's agent, for a claim of \$10,000, and that the property was shortly thereafter sold directly by property to Wormwood, Wormwood's claim, under a letter of authorization given by the Wormwood, Wormwood defended the action on behalf of his client, filed by the court against a party residing in a Chicago and Chicago for defendants, from which plaintiff has taken an appeal.

The apartment building, located at the northeast corner of Washington and Michigan avenues in Chicago, was acquired by plaintiff and others in 1925. The title thereto was placed in a trust with Alfred Wormwood as trustee, of which Wormwood became the sole beneficiary. Alfred and other persons were given no bill the property for the purpose of selling the same and to the condition of the building, its income and expenses, taxes, improvements and financial statements. Plaintiff had known class for

several years, and in September 1942 told him that he needed money and desired to sell the property at a price which would net him \$50,000 after deducting broker's commission. Glass then interviewed a number of prospective purchasers and showed them the building by appointment with a resident manager to whom Bromberg had referred him.

It appears from the undisputed evidence that on October 14, 1942 Glass called Fein on the telephone with respect to a mortgage that Fein's client had purchased, and Glass testified that in the course of that conversation Fein said: "If you have any buildings to submit to me, my client is a ready buyer, has cash and will make a quick deal." Glass then inquired of Fein whether he had ever heard of the Greenview and Schreiber building. Fein replied that he had not, and Glass thereupon proceeded to tell him some of the facts about the building, but was interrupted by Fein who said: "Well, don't tell me all these facts over the phone. Why don't you submit to me a complete statement of the building?" Glass replied that he would do so, and testified that Fein told him "he would submit it to his client." Immediately thereafter Glass addressed the following letter to Fein at his office in Chicago: "Pursuant to our telephone conversation of this date [October 14, 1942], we are pleased to enclose herewith our memorandum set-up on the property located on the southwest corner of Greenview and Schreiber avenues. This property can be delivered at once, no bidding involved and can be delivered for \$52,500. Your fee for representing your client in this matter will be \$500 and ~~the~~ will be paid out of the proceeds of the sale if and when the sale is consummated with your client. We would appreciate an early inspection of this property and hope it meets with your client's approval." With the letter Glass also submitted to Fein particularized data showing the location







of the building, its approximate age, the size of the lot, a description of the neighborhood, detailed facts as to the 18 apartments contained within the building, the manner in which they had recently been modernized by the installation of new stoves, individual refrigerators, metal kitchen and table-top cabinets with drawers and indirect lighting, as well as a description of the exterior of the building, showing that it had recently been tuckpointed, the windows and door openings caulked, the exterior entirely cleaned by stone sand blasting, and the exterior woodwork and porches repaired and painted. Also enclosed with the letter was another sheet containing information as to the bathroom equipment, lavatories, refrigerators, tile floors and other accessories, showing the "frozen" rentals in detail for each apartment, aggregating \$12,030 annually, stating the fair market value of the building at \$60,000, the details as to the mortgage indebtedness, the detailed operating expenses totaling \$4,218, and taxes for the year 1941 amounting to \$1,362. Both of the enclosures were signed by Glass and transmitted with his letter to Fein.

Glass received no response to his letter, but on October 21, 1942, a week after the letter was mailed, he went to the escrow department of the Chicago Title and Trust Company, where he found Fein and Bromberg entering into an escrow agreement for the purchase of the property by Fein's client, Alfred Rouske. Glass took Bromberg aside and showed him a copy of his letter and memorandum of October 14. Bromberg thereupon exhibited the letter to Fein, who, according to Glass, stated, "I have nothing to do with this." Bromberg then asked Fein if he had received the letter, but Fein did not answer, and Bromberg then said: I want to know Mr. Glass's position. I am an attorney, and I know that he is entitled to a fee on brokerage, if that is true." Further conversation ensued,

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of the building, its appearance, and the time of the day,  
a description of the neighborhood, and the fact as to the  
is apartment contained within the building, the manner in  
which they had recently been obtained by the installation  
of new stoves, individual refrigerators, metal kitchen and  
bath-top cabinets with drawers and indirect lighting, as well  
as a description of the exterior of the building, showing that  
it had recently been repainted, the windows and door openings  
checked, the exterior walls cleaned by stone sand blasting,  
and the exterior roof and porches repaired and painted.  
Also enclosed with the letter was another sheet containing in-  
formation as to the building equipment, lavatories, refriger-  
ators, life floors and other accessories, showing the "broken"  
rentals in detail for each apartment, aggregating \$25,000  
annually, showing the fair market value of the building at  
\$60,000, the details as to the mortgage indebtedness, the de-  
tails of operating expenses totaling \$4,114, and taxes for the  
year 1941 amounting to \$1,364. Both of the enclosures were  
signed by Glass and transmitted with his letter to Tamm.  
Glass received no response to his letter, but on  
October 11, 1941, a week after the letter was mailed, he went  
to the record department of the Chicago Title and Trust  
Company, where he found that the mortgage had been entered into an  
error agreement for the purchase of the property by Tamm's  
client, Alfred Rosenberg. Glass took Rosenberg aside and showed  
him a copy of his letter and memorandum of October 14, Rosenberg  
thereupon admitted the letter to Tamm, who, according to Glass,  
stated, "I have nothing to do with this." Rosenberg then asked  
Tamm if he had received the letter, but Tamm did not answer,  
and Rosenberg then said: "I want to know Mr. Glass's position.  
I am an attorney, and I know that he is entitled to a fee on  
this matter, if that is true." Rosenberg conversation ended.



during which Glass made a specific demand for commission for the sale to Fein or his client, with the result that Bromberg asked for, and Fein gave him, a written indemnification, on behalf of Rouske, against Glass's claim.

When called as a witness, Bromberg testified that when Glass told him in the escrow department that he had submitted the property to Fein, he asked Fein and his client, Rouske, whether Glass had in fact submitted the property to either one of them, that Fein said "No," and agreed to give Bromberg the letter of indemnification. On cross-examination Bromberg testified as follows: "Q. And he [Glass], said, 'I submitted this proposition to Harold Fein,' and then you asked Fein if that was so? A. That is right. Q. What did Fein say? A. He said it is not true. Q. Then you asked for a letter of indemnification? A. I asked for the letter from Fein? No, from Fein's client, Rouske. Q. Indemnifying you against any claim for commission based on that statement of Fein's? A. I did, that is right." The property was sold by Bromberg to Rouske for \$50,000 as the result of the agreement entered into in the escrow department of the Chicago Title and Trust Company on October 21, 1942.

Although Fein at first denied having received the letter of submission from Glass, he ultimately produced the letter, which had been in his possession continuously from the time it was sent until the date of the trial, and admitted having received it.

Concerning the meeting in the escrow department of the Chicago Title and Trust Company, Glass testified as follows: "I entered the Trust Department and spied Mr. Bromberg sitting at Mr. Owen's desk. I asked Mr. Owen's indulgence and asked if I couldn't speak to Mr. Bromberg. Mr. Bromberg asked me



During the trial, the evidence was presented in the following manner: The first witness, who was called by the prosecution, testified that on the day in question, he saw the defendant at the scene of the crime. He further testified that the defendant was acting in a suspicious manner and that he was aware of the fact that the defendant was guilty of the crime.

The second witness, who was called by the defense, testified that he saw the defendant at the scene of the crime on the same day. He further testified that the defendant was acting in a normal manner and that he was not aware of the fact that the defendant was guilty of the crime.

The third witness, who was called by the prosecution, testified that he saw the defendant at the scene of the crime on the same day. He further testified that the defendant was acting in a suspicious manner and that he was aware of the fact that the defendant was guilty of the crime.

The fourth witness, who was called by the defense, testified that he saw the defendant at the scene of the crime on the same day. He further testified that the defendant was acting in a normal manner and that he was not aware of the fact that the defendant was guilty of the crime.

The fifth witness, who was called by the prosecution, testified that he saw the defendant at the scene of the crime on the same day. He further testified that the defendant was acting in a suspicious manner and that he was aware of the fact that the defendant was guilty of the crime.

The sixth witness, who was called by the defense, testified that he saw the defendant at the scene of the crime on the same day. He further testified that the defendant was acting in a normal manner and that he was not aware of the fact that the defendant was guilty of the crime.

The seventh witness, who was called by the prosecution, testified that he saw the defendant at the scene of the crime on the same day. He further testified that the defendant was acting in a suspicious manner and that he was aware of the fact that the defendant was guilty of the crime.

The eighth witness, who was called by the defense, testified that he saw the defendant at the scene of the crime on the same day. He further testified that the defendant was acting in a normal manner and that he was not aware of the fact that the defendant was guilty of the crime.

The ninth witness, who was called by the prosecution, testified that he saw the defendant at the scene of the crime on the same day. He further testified that the defendant was acting in a suspicious manner and that he was aware of the fact that the defendant was guilty of the crime.

The tenth witness, who was called by the defense, testified that he saw the defendant at the scene of the crime on the same day. He further testified that the defendant was acting in a normal manner and that he was not aware of the fact that the defendant was guilty of the crime.

to wait just a moment, he was talking to Mr. Fein. He got through and we stepped to one side and I said, 'Mr. Bromberg, I have a copy of a letter here that I wrote to Mr. Harold Fein. I would like you to look at it.' I showed him a copy of the submission. Mr. Bromberg looked at the letter, walked over to Mr. Fein and said, 'Mr. Fein, I have a copy of a letter that was addressed to you that Mr. Glass mailed you and I would like you to read<sup>it.</sup>' Mr. Fein inspected the copy of the letter, threw it on the table, and said, 'I have nothing to do with this.' Mr. Bromberg said, 'Well, Mr. Glass purports to have written you a letter in respect to the sale, purchase of this property and I want to know whether or not you received it.' Mr. Fein wouldn't answer. He merely said, 'I have made arrangements with you to buy this property. Do you care to sell this property to me or don't you care to sell this property to me?' Mr. Bromberg says, 'I do want to sell you the property, but I do want to know Mr. Glass' position. I am an attorney, and I know that he is entitled to a fee on brokerage, if that is true.' With that Mr. Fein said, 'I am here to buy the property at the price we discussed, and if you don't want to sell me the property, I will leave,' and with that Mr. Fein picked up a check from the desk of Mr. Owen and said, 'Now, you either sell me this property or I will pick up my check.' So I said to Mr. Fein, 'You needn't scare anybody by picking up that check. You are here to buy the property, but if you buy the property, Mr. Bromberg sells the property, Mr. Bromberg owes me a commission.' Mr. Bromberg said, 'I will sell you the property providing you will protect me in respect to Mr. Glass.' So Mr. Fein said, 'Yes, I will give you a letter of indemnification to indemnify you against any action that Mr. Glass may bring.' With that, I said 'Mr. Bromberg, if you sell Mr. Fein or Mr. Fein's client, whomever he represents,



[illegible]



this building, you owe me a commission,' and Mr. Bromberg said 'If I do, you can sue me.' Mr. Fein said to Mr. Owen, 'Mr. Glass is not a party to this escrow. Will you please request him to leave.' I said to Mr. Fein, 'This is a public institution. I am here to talk to Mr. Bromberg in respect to this property and he will give me permission to do so and I will leave without being requested to' and I turned to Mr. Owen and said, 'You couldn't ask me to leave. I will leave just as soon as I am through, and I am through.' Then Mr. Fein said to Mr. Owen, 'Why don't you order him out.' Before Mr. Owen could say anything, I said, 'I am ready to leave, but in leaving, I want to tell you, everyone present here, that if this sale of this property is made, there is a commission owing me and I intend to collect.' At that point, I left and have not seen Mr. Fein until the last time in court."

Alfred L. Rouske, the purchaser, testified that he did not know Glass and first heard of the property on October 21. He then called Fein and asked him to find out who owned the property, and was later told that it was the Liberty National Bank as trustee; that he ascertained from a tenant that rent was being paid to Bromberg, an attorney, and in a telephone conversation with Fein, he inquired as to the sales price, income, taxes and expenses, and was told by Fein that the price was \$50,000, the income \$12,000, the taxes \$1,400 and the expenses approximately \$5,000. Fein was thereupon directed by Rouske to make a deal at \$50,000. Later that same day he met Bromberg and Fein at the latter's office, discussed the building expenses and tenants, and then went to the Chicago Title and Trust Company where an escrow was established and \$50,000 in currency was paid by him. Rouske further testified that the day he first heard of the property he saw the exterior of the building, the halls and part of the basement, but saw





none of the apartments.

Bromberg testified in substance that Fein came to his office October 21, asked about the property, stoves, refrigerators, remodeled apartments, leases, taxes and coal bills, and offered \$45,000, which he refused, saying the price was \$50,000. Fein wanted a fee of \$500, but Bromberg told him he would pay \$250. He stated that the first question he asked Fein, when he walked into his office, was whether the property had been submitted to him or his client by a broker, and that Fein answered "No."

It is Fein's contention that Rouske first learned about the property through Joseph Companion, one of the tenants, who told him the building was for sale, and it is urged that the facts and circumstances in evidence tend to support the conclusion that he did not submit to Rouske the information contained in Glass's letter, that Rouske learned of the property through other sources, that Glass was not the procuring cause of the sale and is therefore not entitled to the commission claimed. At the conclusion of the trial the court expressed the opinion that plaintiff had not made out a case against the defendants because all he did "was to send Fein a letter, and then Fein handled some real estate deal and sold the property"; that the evidence merely disclosed the letter from Glass to Fein, "and Fein using the information to his own advantage or the advantage of the purchaser here, Mr. Rouske, or whomever he represents"; and that in the absence of "at least indirect contact" between Glass and Rouske, the purchaser, plaintiff was not entitled to commission.

[1] The legal aspect of the case presents no difficulty. Plaintiff relies on the well established rule that his right to a commission as broker depends upon whether the sale was procured or effected through his efforts or through information derived





from him, and cannot be defeated by the owner's making a sale himself or through another broker or upon different terms; that it is not necessary that the purchaser be actually introduced to the owner by the broker or that the owner know at the time of his making the sale that the purchaser with whom he is dealing is the one found by the broker. Hafner v. Herron, 165 Ill. 242, Rigdon v. More, 226 Ill. 382, Adams v. Decker, 34 Ill. App. 17, Hutten v. Renner, 74 Ill. App. 124, and Finch v. Betz, 134 Ill. App. 471, sustain these propositions. In Cowan v. Day, 156 Ill. App. 105, it was held that where a broker is the procuring and efficient cause of the sale of property, he becomes entitled to his commissions; that all he is required to do is to find a purchaser for the property, and when he calls the purchaser's attention to the fact that the property is for sale he has performed on his part and is entitled to a commission. Defendant does not question these propositions of law, but predicates his defense on the contention that the purchase of the property by Rouske resulted from independent information obtained by him and Fein, entirely disassociated from the letter of submission by Glass with detailed information pertaining to the building.

[2] The question therefore presented is whether the sale of the property by Bromberg to Rouske was brought about or induced by the efforts of Glass through information derived from him and submitted to Fein for his client. The evidence discloses without question that Glass was employed by Bromberg, the owner of the property, to sell it for him; that in September 1942 Bromberg asked Glass if he could find a buyer for the building and told him he wanted a price, after deducting commissions, which would net \$50,000; that on October 14, 1942 Glass submitted the property to Fein for consideration and possible purchase by one of his clients, at Fein's request; that the information furnished to Fein was so complete and detailed that except for







verification of the figures and an examination of the premises, an intelligent opinion could be formed by a prospective purchaser <sup>as to</sup> whether or not the property should be purchased. Whether by coincidence or otherwise, the interest of Fein and Rouske in the purchase of the property arose immediately after Fein received the submission from Glass. Rouske, the purchaser, testified that he first heard of the property on October 21, and according to Bromberg, Fein came to see him on the same day to inquire about the property. Immediately after visiting Bromberg, Fein reported to Rouske that the income of the building was \$12,000, the taxes \$1,400, the expenses approximately \$5,000 and the sales price \$50,000. With this information Rouske then decided to buy the building. It is hardly likely, however, that he would have done so without knowledge of the detailed breakdown of the financial status of the building, the income and expenses, the condition of the apartments, furnishings and equipment, and other information which was contained in Glass's submission and undoubtedly known to Fein. The court was evidently convinced that Fein had used the information received from Glass, either to his own advantage or that of the purchaser, Mr. Rouske, but decided in favor of defendants under the misapprehension of law that it was incumbent upon Glass to prove that he had had some contact with Rouske before the sale was consummated. It is difficult to believe that Rouske would have purchased the property after only a cursory examination of the exterior of the building, upon such short notice, without the detailed information that an intelligent purchaser would ordinarily require. It is clear that all the necessary information in great detail had been submitted to Fein, and whether or not Rouske was aware of the fact that Fein had received the information from Glass, it would be naive to assume that Fein did not use the details of Glass's submission in advising Rouske about such details as he undoubtedly needed





before making a decision to purchase. In view of the nature of the defense interposed, it would have been simpler for Fein to have admitted, from the outset, the receipt of Glass's letter and to have asserted that his client had never seen the letter, if that was a fact, and had learned about the property through other sources. Plaintiff's counsel suggests that Fein first denied the receipt of Glass's letter because as a lawyer he knew that since Glass had submitted the property, Bromberg would have raised the price to \$52,500 to take care of the commission and obtain \$50,000 net for himself; that in any event the most that Rouske would have to pay under his letter of indemnification would be the additional \$2,500; and that as between paying that sum immediately or speculating on the result of the lawsuit, Fein and Rouske "took the course where they had a chance to win." The amount of the commission is not questioned, and since as we view the record, the sale of the property by Bromberg to Rouske was brought about or induced through the efforts of Glass by means of information derived from him, he is entitled to the sum of \$2,500.

Accordingly, the judgment of the circuit court is reversed and judgment entered ~~here~~ for plaintiff in the sum of \$2,500 and costs.

JUDGMENT REVERSED AND JUDGMENT  
ENTERED HERE FOR PLAINTIFF.

7 Sullivan, P. J., and Scanlan, J., concur.



Before making a decision to purchase, in view of the nature of the defendant's interest, it would have been proper for him to have obtained, from the outset, the receipt of Glass's letter and to have ascertained that his interest had never been the subject of a sale, and that the property had been conveyed through other persons. Plaintiff's counsel suggests that this letter implied the receipt of Glass's letter because as a matter of fact since Glass had executed the property, the latter would have raised the price to \$2,500 to take care of the commission and obtain \$5,000 net for himself; that in any event the fact that Glass would have to pay money in his letter of indemnification would be the additional \$2,500; and that in between saying that and immediately on proceeding on the result of the lawsuit, with and without "look the course" there they had a chance to win. The amount of the commission is not questioned, and since as we view the record, the sale of the property by Fremont to Glass was brought about or induced through the efforts of Glass by means of information derived from him, he is entitled to the sum of \$2,500. Accordingly, the judgment of the District Court is reversed and judgment entered here for plaintiff in the sum of \$2,500 and costs.

REVEREND JAMES H. HARRIS  
JUDGE OF THE DISTRICT COURT

WILLIAM H. HARRIS, J., concur.

42707

VERNON R. MacDONALD,  
  
Appellee,  
  
v.  
  
CHICAGO LAW PRINTING COMPANY,  
a corporation,  
  
Appellant.

32 I.A. 252<sup>1</sup>

APPEAL FROM  
  
CIRCUIT COURT  
  
COOK COUNTY.

*303*

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action for a commission upon an order for printing which plaintiff claims to have procured for defendant. In a trial by the court without a jury judgment was for plaintiff in the amount of \$528.11, and defendant appeals.

The disputed printing contract was executed April 12, 1938, between the Year Book Publishing Company, Inc. and defendant. The contract covered the printing of a series of medical Year Books which had for some years previous been printed by M. & L. Type-setting Company. The disputed contract was terminated October 7, 1938, because of dissatisfaction on both sides. The amount paid to the defendant under the contract for that term was \$5,281.13, ten percent of which is the amount of the judgment entered. The printing work was resumed by defendant a few months after the termination of the first contract. This fact sheds light upon the question involved.

The question presented here is whether the printing business covered by the contract was procured for defendant by plaintiff or by others.

Previous to the negotiations for the disputed contract, President Hart of the Defendant Company had employed plaintiff to solicit commercial printing business and supplied him with business cards which bore his name in large type and defendant's name in



VERNON L. BENTLEY, JR.

Plaintiff,

v.

CHICAGO LAW PRINTING COMPANY,  
a corporation,

Defendant.

COURT REPORT  
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COURT REPORT

THE COURT REPORTER'S ASSOCIATION OF THE CITY OF CHICAGO  
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In a trial by the court without a jury judgment was for plaintiff  
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Previous to the negotiations for the disputed contract,  
President Hart of the defendant company had employed plaintiff to  
solicit commercial printing business and supplied him with business  
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small type. Thurman and Porter were typesetters for several years before 1938, and had set type for the Year Book under a subcontract with the M. & L. Company. When M. & L. Company ceased doing the work, Thurman and Porter lost the typesetting contract. President Simons of the Year Book Publishing Company in February 1938, promised Thurman and Porter that he would place the printing of the Year Books wherever it was to their advantage if prices, services and other factors involved were equal. Following this commitment Thurman had a vacation for a few weeks and was then employed on a temporary basis at the Conkey Printing Company in Hammond, Indiana, where plaintiff's son was a co-employee. The Superintendent of the Conkey Company told Thurman that if he could place the Year Book with Conkey, a permanent situation would be arranged for him. Plaintiff's son overheard this conversation and suggested that Thurman place the business with the defendant. The next morning Thurman called Hart and discussed the business and arranged to see him the following day. Plaintiff called on Thurman and discussed the business before the latter saw Hart.

Plaintiff testified that several weeks after his employment with defendant began, he spoke to Hart about the Year Book work; that he told Hart that Simons had told him there would be 12 or 14 books a year; that several days later they discussed the price and he advised Hart that the estimate which defendant's superintendent and Hart had set up would bear nine cents more per page in view of the prices M. & L. had charged; and that he had submitted the price to Simons and the printing contract resulted. He said he learned of the Year Book job through his son, then saw Simons and again talked to his son at Conkey's who told him of Thurman and the latter's desire for a permanent position; that his son did not say Thurman was authorized to place the printing contract; that

small type. Thurman and Foster were typographers for several years before 1938, and had set type for the Year Book under a subcontract with the M. L. Company. When M. L. Company ceased doing the work, Thurman and Foster lost the typetting contract. President Simons of the Year Book Publishing Company in February 1938, promised Thurman and Foster that he would place the printing of the Year Book wherever it was to their advantage if prices, services and other factors involved were equal. Following this commitment Thurman had a vacation for a few weeks and was then employed on a temporary basis at the Conkey Printing Company in Hammond, Indiana, where Plaintiff's son was a co-employee. The representative of the Conkey Company told Thurman that if he could place the Year Book with Conkey, a permanent situation would be arranged for him. Plaintiff's son overheard this conversation and suggested that Thurman place the business with the defendant. The next morning Thurman called Hart and discussed the business and arranged to see him the following day. Plaintiff called on Thurman and discussed the business before the latter saw Hart. Plaintiff testified that several weeks after his employment with defendant began, he spoke to Hart about the Year Book work; that he told Hart that Simons had told him there would be 15 or 16 books a year; that several days later they discussed the price and he advised Hart that the estimate which defendant's superintendent and Hart had set up would bear nine cents more per page in view of the prices M. L. had charged; and that he had submitted the price to Simons and the printing contract resulted. He said he learned of the Year Book job through his son, when saw Simons and again talked to his son at Conkey's who told him of Thurman and the latter's desire for a permanent position; that his son did not say Thurman was authorized to place the printing contract; that



plaintiff called on Thurman and discussed the work with him, saying he had estimated on it and told him that he had discussed a permanent assignment for him with Simons and would make every effort to secure a permanent position. He later saw Thurman and Porter, but said neither one told him of any authority to place the contract nor of any connection of the Year Book Publishers, Inc. He denied that Simons told him that the work was already committed to Thurman and Porter and said that Simon had arranged for him to get some samples of the Year Book to use in setting up the estimate.

Simons testified he saw plaintiff in early April, 1938 and talked to him about the Year Book work and that plaintiff was told that Simons was already committed to Thurman and Porter. He said he did not remember details, but said he thought plaintiff appeared, not as defendant's representative, but as a broker and presumed they had talked about Simons' previous dealings with M. & L. He admitted that plaintiff may have been given sample books and did not deny plaintiff submitted an estimate, saying that if one was submitted it would go to Mr. Shaw, but that any final offer would be to Simons. Simons did not say with whom final negotiations for the contract were carried on.

Thurman testified that plaintiff called on him, representing himself as a substantial stockholder of the defendant; that he produced a card and discussed the Year Book Business; that Thurman had sample books which he showed plaintiff and that plaintiff was vague about the price and Thurman told him that he would contact Hart; that he did so and saw Hart the next day; that plaintiff appeared when he and Hart were discussing the work;<sup>and</sup> that Thurman introduced Hart to Simons and that from that point Hart and Simons negotiated the contract. He said he learned from Hart that plaintiff had grossly



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the contract. He said he learned from Hart that plaintiff had grossly

misrepresented himself and ignored plaintiff's calls thereafter. Thurman and Porter went to work for plaintiff the day following the execution of the printing contract and were paid \$6 per week above the scale according to Thurman for procuring the Year Book business and when the contract was canceled he stayed on at the normal scale. He said he saw the contract drawn between Simon and Hart and that his and Porter's names were written in it. He denied that plaintiff told him he had already seen Simons about the work. He said that he tried to place the Year Book business in Chicago, but found no printers equipped to do it and, although he worked at Conkey's for several weeks, he was actually trying to place the Year Book business.

Hart testified that Thurman told him he had the placing of the Year Book business; that they met and he "thought" Thurman introduced him to Simons and that after Thurman "introduced him", he and Simons worked out the contract; that plaintiff saw Thurman and Hart together and said, "Oh, I see you have gotten together"; and that he next saw plaintiff in 1939 when plaintiff claimed and Hart denied that he had commission coming for procuring the business. Hart denied that plaintiff procured the work or helped set the price and said that plaintiff did not seem familiar with the work, so that Hart talked over the price with Thurman. Plaintiff does not say he brought Simons and Hart together. The contract clearly indicates that Simon and Hart discussed the terms the day preceding the execution of the contract.

Simons did not testify that plaintiff did not submit a price and Shaw of the Year Book Publishers, Inc. did not testify. It is clear that plaintiff talked to Simons before the contract was made and since Simons admits that sample books may have been given to plaintiff, it is clear that Thurman and Porter did not have the exclusive commitment to place his business and Simons does not say



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Thurman and Porter went to work for plaintiff the day following the execution of the printing contract and were paid 10 per week above the scale according to Thurman for procuring the Year Book business, and when the contract was canceled he stayed on at the normal scale.

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the commitment to them was exclusive. Neither Thurman nor Hart could deny that plaintiff was authorized to submit an estimate to Simons. Thurman said first that he spoke to and made an appointment with Hart before plaintiff called. He later said he called Hart and made the appointment because plaintiff was so vague about an estimated price for the Year Books. Hart says plaintiff did not help make up the price because plaintiff did not know about the work and that Thurman helped set up the price. Thurman says that all he did was introduce Simon and Hart and they negotiated from that point. Hart's testimony is not consistent with plaintiff's activity in the transaction. He had talked with Simon about the M. & L. business and had been in the printing business for many years. Moreover, Hart's story about the setting of the price coincides substantially with plaintiff's. It is clear that plaintiff took some part in the transaction, had discussed the business with the principals and with Thurman and had been offered \$100 by Hart. It is true that the contract states that Thurman and Porter were to enter defendant's employ, and plaintiff, said he had talked to both Simon and Hart about placing them, and it was to the advantage of both Simon and Hart to have the experienced and efficient type-setters. Thurman's testimony is not convincing to confirm an exclusive commitment. He says he tried to locate a place in Chicago for the Year Book business, but found no plant equipped. This is not consistent with the testimony that he did not learn of defendant which was equipped and located in Chicago - until plaintiff's son suggested it. He says that he worked several weeks at Conkey's, although he was really trying to place the work. This is hardly consistent with his own testimony that Conkey asked him to place the work with it, promising a permanent situation. His lack of effort to execute the commitment is consistent with plaintiff's story that Simons authorized him to figure on the work.



the commitment to them was exclusive. Whether Thurman nor Hart could deny that plaintiff was authorized to submit an estimate to Simon. Thurman said that he spoke to and made an appointment with Hart before plaintiff called. He later said he called Hart and made the appointment because plaintiff was so vague about an estimated price for the book. Hart says plaintiff did not help make up the price because plaintiff did not know about the work and that Thurman helped set up the price. Thurman says that all he did was introduce Simon and Hart and they negotiated from that point. Hart's testimony is not consistent with plaintiff's activity in the transaction. He had talked with Simon about the K. & L. business and had been in the printing business for many years. Moreover, Hart's story about the setting of the price coincides substantially with plaintiff's. It is clear that plaintiff took some part in the transaction, had discussed the business with the originals and with Thurman and had been offered \$100 by Hart. It is true that the contract stated that Thurman and Hart were to enter defendant's employ, and plaintiff, said he had talked to both Simon and Hart about placing them, and it was to the advantage of both Simon and Hart to have the experienced and efficient typewriters. Thurman's testimony is not convincing to confirm an exclusive commitment. He says he tried to locate a place in Chicago for the book business, but found no place suitable. This is not consistent with the testimony that he did not learn of defendant which was dropped and located in Chicago - until plaintiff's son suggested it. He says that he worked several weeks at Conkey's, although he was really trying to place the work. This is hardly consistent with his own testimony that Conkey asked him to place the work with it, promising a permanent situation. His lack of effort to execute the commitment is consistent with plaintiff's story that Simon authorized him to figure on the

There is no question but that plaintiff performed services in connection with the transaction. While he makes no claim that he brought the contracting parties together, that was not essential if he, in fact, was authorized by Simons to submit an estimate on behalf of defendant and thereafter did submit an estimate which resulted in the contract. The most damaging inference against plaintiff is his calling upon Thurman. If he called on him, knowing that he was a factor in control of the business and worked with him as plaintiff argues in this court and used information obtained from him and obtained his help through efforts to place him in the typesetting work, these facts would not militate against him if, as a result of them, he obtained the business for defendant. Plaintiff, however, did not testify that this was the case. He denies that his son told him Thurman had the placing of the job. He denies that Thurman and Porter told him they had the placing of the job and says that Thurman did not say he had any connection with the Year Book Publishers. According to plaintiff, his reason for going to see Thurman was that his, plaintiff's, son told him that Thurman wanted a permanent job. This testimony is difficult to reconcile with plaintiff's discussion with Thurman of the Year Book business, his call on Simons and his estimate. Plaintiff says that he had learned through his son that Thurman worked on the Year Books. This is consistent with plaintiff's testimony that, with his experience, Thurman would be a valuable man in doing the work.

Plaintiff was the sole witness in his behalf upon the issue involved here and his testimony was not clear or definite. The testimony for defendant was not definite on most points either. Simons did not remember details and we have pointed out discrepancies in Thurman's testimony. Moreover, Hart's testimony that Thurman introduced him to Simons was indefinite and there were inconsistencies



There is no question but that plaintiff's personal services  
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issue involved here and his testimony was not clear or definite. The  
testimony for defendant was not definite on most points either.  
Plaintiff did not remember details and he has pointed out discrepancies  
in Thurman's testimony. Moreover, part of testimony that Thurman  
introduced him to him was indefinite and there were inconsistencies

in Hart's testimony. We realize that the trial court was in a better position than we are to judge the credibility of these witnesses and that all reasonable presumptions must be indulged in favor of the judgment. Defendant does not contend plaintiff did not prove a prima facie case. We believe, however, that plaintiff has not proved by a preponderance of the evidence, that he obtained the business for defendant. There should have been clearer and more definite proof of the facts necessary to prove that ultimate fact. For this reason we believe that justice requires a reversal of the judgment and a retrial of the issue.

JUDGMENT REVERSED AND CAUSE REMANDED.

BURKE, P.J. AND LUPE, J. CONCUR.



in fact's testimony. We realize that the trial court was in a better position than we are to judge the credibility of these witnesses and that all reasonable questions must be resolved in favor of the judgment. Defendant does not contend plaintiff did not prove a crime took place. We believe, however, that plaintiff has not proved by a preponderance of the evidence, that he obtained the business for defendant. There should have been clearer and more definite proof of the facts necessary to prove that plaintiff lost. For this reason we believe that justice requires a reversal of the judgment and a retrial of the case.

JUDGMENT SET ASIDE AND CASE REMANDED.

BURKE, J., and LUNT, J. CONCUR.

42889

THERMAL-TITE INSULATION COMPANY,  
a corporation,

Plaintiff - Appellant,

v.

AMERICAN INSULATION CORPORATION,

Defendant - Appellee.

323 I.A. 252

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

304

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action for the sale price of insulating material, with a counter claim for commissions under an alleged verbal contract. Plaintiff's claim was not disputed and a judgment for \$384 was entered in its favor. The counter claim was resisted by counter defendant, plaintiff, and it appeals from a judgment on the counter claim of \$250. We shall refer to plaintiff and counter defendant as the Company and to the defendant and counter plaintiff as the Corporation.

The Company contends there was no contract and that, even if there were, it would have come within the prohibition of Section 1 of the Statute of Frauds (Chap. 59, Ill. Rev. Stats.) and Section 4 of the Uniform Sales Act (Chap. 121 $\frac{1}{2}$ , Ill. Rev. Stats.) and that accordingly, the Corporation should not recover.

The Corporation was a jobber or broker through which the Company sold rock wool for insulation. The Corporation would order the rock wool for its customers, insulation applicators, and the Company would ship the rock wool direct to the customers, but send the bill to the Corporation which, in turn, billed its customers. By agreement the bill was marked up 10% and the Corporation charged its customers \$35 per ton for the merchandise which the Company sold it for \$32 per ton. The Company's suit was begun to collect a bill for one of these shipments. The Corporation <sup>had</sup> refused to pay



85-1-1-552

APPEAL FROM

UNION PACIFIC

OF CHICAGO

THE LIT-TITE INSULATION COMPANY,  
a corporation,

Plaintiff - Appellant,

v.

AMERICAN INSULATION CORPORATION,

Defendant - Appellee.

MR. JUSTICE KELLY delivered the opinion of the court.

This is an action for the sale price of insulating

material, with a counter claim for commissions under an alleged

verbal contract. Plaintiff's claim was not disputed and a judgment

for \$384 was entered in its favor. The counter claim was resisted

by counter defendant, plaintiff, and it appears from a judgment on

the counter claim of \$250. We shall refer to plaintiff and counter

defendant as the Company and to the defendant and counter plaintiff

as the Corporation.

The Company contends there was no contract and that, even

if there were, it would have come within the prohibition of Section

1 of the Statute of Frauds (Comp. St. Ill. Rev. Stat., and Section 4

of the Uniform Sales Act (Comp. St. Ill. Rev. Stat.) and that

accordingly, the Corporation should not recover.

The Corporation was a jobber or broker through which the

Company sold rock wool for insulation. The Corporation would order

the rock wool for its customers, insulation applications, and the

Company would ship the rock wool direct to the customers, but send

the bill to the Corporation which, in turn, billed its customers.

By agreement the bill was marked up 10% and the Corporation charged

its customers 33 per cent for the merchandise which the Company

sold it for 38 per cent. The Company's bill was drawn to collect

and

a bill for one of these shipments. The Corporation refused to pay

until it was given an accounting for commissions it claimed under an oral agreement with the Company. This alleged agreement is the nub of the appeal. The judgment implies that the trial court found such an agreement was made.

Weiss, president of the Corporation, testified that he made the contract with Johnston, who said he was president of the Company, early in 1941; that under the contract the Corporation was to solicit customers for the Company, and receive a commission of 10% of the sales; that whatever customers were to be obtained were to be billed through the Corporation in the manner referred to, but that should any be billed direct, the Company would pay the Corporation its 10%; that the Company would not solicit the Corporation's customers direct; and that the Corporation would guarantee the credit of its customers. Weiss further testified that the Company solicited a customer direct in March 1941, but later paid the commission, saying the event was an "oversight" and that subsequently Weiss checked and found other instances of direct solicitation and sales without payment of commission to the Corporation. Johnston testified that he was vice president of the Company and had negotiated with Weiss but did not sign an agreement and that the Company did not "sign" an agreement. It appears that Weiss drew a written agreement which was not signed. The dispute, however, concerns an oral agreement, and Johnston does not deny making an oral agreement. He admits agreeing with Weiss as a "matter of courtesy to a distributor in good standing", that the Company would not interfere with the Corporation's customers. Johnston and Keegan, the latter president of the Company, testified the only agreement was to sell through the Corporation at jobbers' prices. Keegan denies any agreement to pay commissions, saying that he told Weiss as long as the Corporation was in good standing, the Company would not bother its customers.



until it was given an accounting for commissions it claimed under an oral agreement with the Company. This alleged agreement is the nub of the dispute. The judgment implies that the trial court found such an agreement was made.

Wells, president of the Corporation, testified that he made the contract with Johnston, who said he was president of the Company, early in 1941; that under the contract the Corporation was to solicit customers for the Company, and receive a commission of 10% of the sales; that whatever customers were to be obtained were to be billed through the Corporation in the manner referred to, but that should any be billed direct, the Company would pay the Corporation 10%; that the Company would not solicit the Corporation's customers direct; and that the Corporation would guarantee the credit of its customers. Wells further testified that the Company solicited a customer direct in March 1941, but later paid the commission, saying the event was an "oversight" and that subsequently Wells checked and found other instances of direct solicitation and sales without payment of commission to the Corporation. Johnston testified that he was vice president of the Company and had negotiated with Wells but did not sign an agreement and that the Company did not "sign" an agreement. It appears that Wells drew a written agreement which was not signed. The dispute, however, concerns an oral agreement, and Johnston does not deny making an oral agreement. He admits agreeing with Wells as a "matter of courtesy to a distributor in good standing," that the Company would not interfere with the Corporation's customers. Johnston and Keenan, the latter president of the Company, testified the only agreement was to sell through the Corporation at Johnson's prices. Keenan denies any agreement to pay commissions, saying that he told Wells as long as the Corporation was in good standing, the Company would not bother its customers.

It was stipulated that the Company sold merchandise to customers, supplied by the Corporation directly, amounting to \$6,340.03 for which no commissions were paid. An official of one of these customers, American Insulation Corporation, a company of Rock Island, Illinois, testified that Johnston told him that if the customer used a fictitious name - Iowa Insulation Distributors - and a different address in Davenport, Iowa, the 10% commission due the Corporation could be avoided and the customer's price reduced that amount. Johnston admitted that he knew the officials of the Company involved were Weiss' customers, but that he did not suggest the use of a fictitious name. The customer, however, was billed not in its own name, but under the name of Iowa Insulation Distributors, and the bills, were paid in the name of the American Insulation and Roofing Company. Johnston denied that this arrangement was a device to circumvent the Corporation and says that he was informed that the Iowa Insulation Distributors was a bona fide firm under the management of the officials of the American Insulation Roofing Company and that the shipments were made to Davenport, Iowa, in order to avoid the Illinois Sales Tax. It appears from the evidence, however, that at least one shipment was made to the American Insulation Company at Rock Island, Illinois. The Company admits having paid commissions to the Corporation on the direct sale made "through an oversight", but the officers testified that this was done as a courtesy and "to save an argument". The trial court saw and heard these witnesses and was justified in finding that the oral contract alleged by the Corporation had been made.

The counter claim was not based upon a sale but upon an oral contract for commissions. Section 4 of the Uniform Sales Act does not, therefore, apply.

The Company contends that under the Corporation theory, the contract was not to be performed within a year and is, therefore,



It was stipulated that the Company sold merchandise to customers, supplied by the Corporation directly, amounting to \$5,400.00 for which no commissions were paid. An official of one of these customers, American Insulation Corporation, a company of Rock Island, Illinois, testified that Johnston told him that if the customer used a fictitious name - Iowa Insulation Distributors - and a different address in Davenport, Iowa, the 10% commission due the Corporation would be avoided and the customer's price reduced that amount. Johnston admitted that he knew the officials of the Company involved were "sales" customers, but that he did not suggest the use of a fictitious name. The customer, however, was billed not in its own name, but under the name of Iowa Insulation Distributors, and the bills, were paid in the name of the American Insulation and Roofing Company. Johnston denied that this arrangement was a device to circumvent the Corporation and says that he was informed that the Iowa Insulation Distributors was a bona fide firm under the management of the officials of the American Insulation Roofing Company and that the shipments were made to Davenport, Iowa, in order to avoid the Illinois sales tax. It appears from the evidence, however, that at least one shipment was made to the American Insulation Company at Rock Island, Illinois. The Company admits having paid commissions to the Corporation on the first sale made "through an oversight," but the officers testified that this was done as a courtesy and "to save an argument". The trial court saw and heard these witnesses and was justified in finding that the oral contract alleged by the Corporation had been made.

The counter claim was not based upon a sale but upon an oral contract for commissions. Section 4 of the Uniform Sales Act does not, therefore, apply.

The Company contends that under the Corporation theory, the contract was not to be performed within a year and is, therefore,

unenforceable by virtue of Section 1 of the Statute of Frauds. It refers to the testimony of Weiss that there was no time limit "on the arrangement" and that it would be "forever" as far as any duty was concerned. The purpose of the Statute of Frauds is to prevent false swearing and perjury, but it cannot be invoked to perpetrate a wrong. The contract was not for any stated period beyond a year, but was indefinite as to terms. There was no stated number of customers the Corporation was to introduce. The contract was, by its nature, dependent upon the ability of Weiss and, since he could have died within a year of its making, for that reason it could have been performed within a year and, accordingly, the contract does not come within the Statute of Frauds. Osgood v. Skinner, 111 Ill. App. 606; Mead v. C. & N. W. Ry. Co., 189 Ill. App. 323; 49 Am. Juris. p. 414; Browne, Statute of Frauds, 4th Ed. Sec. 276. The Company argues that the parties here are Corporations and that the foregoing rule does not apply. Corporations may suffer the same fate as individuals. The contract appears to be one which either party might have terminated within a year and, for that reason, does not come within the Statute of Frauds. (Mead v. C. & N. W. Ry. Co.; Browne, Statute of Frauds, Sec. 276; Amer. Juris. p. 414; Everitt v. New York Engraving & Printing Co., 35 N. Y. Supp. 1097). In fact the evidence shows that the Company removed the Corporation as jobber in September 1941, which was within a year of the making of the oral contract.

For the reasons given the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND LUPE, J. CONCUR.



unintentionally by virtue of section 1 of the Statute of 1891, I refer to the testimony of the witness that there was no time limit on the arrangement, and that it would be "forever" as far as any duty was concerned. The purpose of the Statute of 1891 is to prevent false swearing and perjury, but it cannot be invoked to perpetrate a wrong. The contract was not for any stated period beyond a year,

but was indefinite as to terms. There was no stated number of customers the corporation was to introduce. The contract was, of its nature, dependent upon the ability of the sales and, since no

could have died within a year of its making, for that reason it could have been performed within a year and, accordingly, the contract does not come within the Statute of 1891. Quinn v. Skinner, 111 Ill.

App. 603; Ward v. C. & N. E. Ry. Co., 189 Ill. App. 531; 40 Ill. 411; Crowe, Statute of 1891, 42 Ill. 275. The company argues that the parties here are corporations and that the foregoing

rule does not apply. Corporation may enter the same type of individuals. The contract appears to be one which either party might have terminated within a year and, for that reason, does not come

within the Statute of 1891. (Ward v. C. & N. E. Ry. Co.; Crowe, Statute of 1891, 42 Ill. 275; Quinn v. Skinner, 111 Ill. App. 603). In fact the evidence

shows that the Company removed the Corporation as partner in September 1901, which was within a year of the making of the oral contract. For the reasons given the judgment of the Municipal Court

is affirmed.  
JUDGMENT AFFIRMED.  
BUTLER, J. J. AND JUDGE, J. CONCUR.

42958

MARY LATHAM,

Plaintiff - Appellee,

v.

HOWARD D. SALISBURY,

Defendant - Appellant.

305  
APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

326 I.A. 253

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an order denying his motion to vacate an ex parte judgment in a suit brought by his mother-in-law for necessities furnished his wife and child.

Plaintiff sued January 23, 1931, claiming that her daughter and grandson, defendant's wife and son, during 1929 and 1930 lived separate and apart from defendant because of his cruelty; that defendant's wife was without means to support herself and son; that defendant neglected to provide for them and that plaintiff supplied necessities for them to the extent of \$2,000, in consideration of which defendant promised to repay that sum; and that he, although requested, has refused to pay. Defendant through Litsinger, Healy & Reid, Attorneys, filed a demurrer February 4, 1931 and, on October 26, 1934, filed a plea of nonassumpsit. June 17, 1936 the ex parte judgment was entered against defendant in the sum of \$1,842.00. July 17, 1936 defendant filed a sworn petition asking that the judgment be vacated and that Leon Isaacson, Attorney, be given leave to appear as defendant's attorney in lieu of those first named. The petition recited that defendant had no attorney representing him when the judgment was entered, was not informed that the cause had been placed on a "special calendar" and set for trial, and first learned of the judgment on July 16, 1937. The "motion to vacate" was entered and continued until further notice.



MARY LATHAM,

Plaintiff - Defendant,

v.

ROBERT D. LATHAM,

Defendant - Appellant.

COOK COUNTY

COURT

323 I.A. 253

AP. JUSTICE KILPATRICK DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an order denying his motion to

vacate an ex parte judgment in a suit brought by his mother-in-law

for necessities furnished his wife and child.

Plaintiff sued January 22, 1931, claiming that her

daughter and grandson, defendant's wife and son, during 1929 and

1930 lived separate and apart from defendant because of his cruelty;

that defendant's wife was without means to support herself and son;

that defendant neglected to provide for them and that plaintiff

supplied necessities for them to the extent of \$7,000, in consider-

ation of which defendant promised to repay that sum; and that he,

although requested, has refused to pay. Defendant through Lathams,

Nally & Felt, Attorneys, filed a summary February 4, 1931 and,

on October 26, 1931, filed a plea of nonassumpsit. June 17, 1932 the

ex parte judgment was entered, against defendant in the sum of

\$1,842.00. July 17, 1932 defendant filed a sworn petition asking

that the judgment be vacated and that Leon Isaacson, Attorney, be

given leave to appear as defendant's attorney in lieu of those

first named. The petition recited that defendant had no attorney

representing him when the judgment was entered, was not informed

that the case had been placed on a "special calendar" and set

for trial, and first learned of the judgment on July 16, 1932. The

"motion to vacate" was entered and continued until further notice.

No further proceedings were had until January 14, 1943, when defendant through Sonneschein & Mitchell, Attorneys, upon notice, presented a petition reciting the history of the proceedings and stated that defendant had "at all times" been of the impression that the judgment had been vacated and the cause placed on a calendar for trial; that defendant had a meritorious defense in said matter and "that he is not obligated in any way, manner or form to said plaintiff." Defendant asked leave to file an affidavit of merits and that the cause be set for trial. The motion was entered and continued to April 14th. On that date an affidavit of defense was filed in the clerk's office. The record does not show any ruling upon "the motion to vacate" or for leave to file the affidavit, neither does the record before us show the filing of a withdrawal by Litsinger, Healy & Reid, or the appearance and withdrawal of Attorney Isaacson. April 29, 1943, plaintiff served notice that she would at the hearing of defendant's petition to vacate and for leave to defend, ask the court to deny the prayers of the petitions filed July 17, 1936 and January 14, 1943, and also move to strike the "Affidavit of Defense" and that in support of her motion she would present affidavits of her attorney, her grandson and herself. April 30, 1943, Sonneschein and Mitchell were given leave to withdraw as defendant's attorneys. May 19, 1943 defendant moved to strike the affidavits which had been filed in the clerk's office with plaintiff's notice above referred to. This motion was made by Attorney Weiss who was given leave to enter his appearance as defendant's attorney and the motion was continued. June 2, 1943 Attorney Weiss was given leave to withdraw his appearance. June 16, 1943 Attorney Harold Blake filed a "substitution" as attorney for defendant. The record does not show that he was given leave to do so.



no further proceedings were had until January 14, 1945,

when defendant through counsel, Mitchell, attorneys, upon

notice, presented a petition reciting the history of the proceedings and stated that defendant had "at all times" been of the impression

that the judgment had been vacated and the case placed on a

calendar for trial; that defendant had a meritorious defense in

said matter and "that he is not obligated in any way, manner or

form to said plaintiff." Defendant asked leave to file an affi-

davit of merits and that the case be set for trial. The motion

was entered and continued to April 1, 1945. On that date an affidavit

of defense was filed in the clerk's office. The record does not

show any ruling upon "the motion to vacate" or for leave to file

the affidavit, neither does the record below us show the filing of

a withdrawal by plaintiff, orally or the appearance and

withdrawal of attorney Isaacson. April 20, 1945, plaintiff moved

notice that she would at the hearing of defendant's petition to

vacate and for leave to defend, ask the court to deny the prayers

of the petition filed July 17, 1938 and January 14, 1945, and

also move to strike the "affidavit of defense" and that in support

of her motion she would present affidavits of her attorney, her

grandson and herself. April 20, 1945, Isaacson and Mitchell

were given leave to withdraw as defendant's attorneys. May 18, 1945

defendant moved to strike the affidavit which had been filed in

the clerk's office with plaintiff's notice above referred to. This

motion was made by attorney Isaacson who was given leave to enter his

appearance as defendant's attorney and the action was continued.

June 1, 1945 attorney Isaacson was given leave to withdraw his appearance.

June 18, 1945 attorney Harold Glass filed a "petition" as

attorney for defendant. The record does not show that he was given

leave to do so.

June 18, 1943 an order was entered denying "the motion to vacate" entered June 17, 1936, as being "without merit". The order found, though the pertinent record does not otherwise show, that when the ex parte judgment was entered Litsinger, Healy & Reid had withdrawn as defendant's attorney and his appearance pro se was on file. The order recited the history of defendant's attorneys, their appearances, withdrawal and substitutions; referred to the many months the motion had been pending and the numerous continuances granted; and denied the "motion to vacate" and refused Attorney Blake leave to appear. The record does not show that defendant had obtained leave to file the "Affidavit of Defense" and when it was filed he had not yet brought his petition, seeking to vacate the judgment, to a hearing. The trial court properly disregarded the Affidavit.

The only pleadings properly before the court when the final order was entered were defendant's petitions of July 17, 1936 and January 14, 1943. Looking back from the findings in the final order to the statement in the first petition, there was plainly no excuse shown why defendant was not present for the trial. If he purported to represent himself, he assumed the responsibility of watching calendars and trial dates. Furthermore, there is no attempt to show that defendant had a meritorious defense to plaintiff's action. The second petition stated that defendant has a "meritorious defense" and is "not obligated" to plaintiff. Those conclusions were insufficient. If defendant had a defense he should have set up the facts which constituted it.

The petitions were addressed to the discretion of the trial court and, from what we have said, it should be clear that there was no abuse of that discretion. The order is hereby affirmed.

ORDER AFFIRMED.

BURKE, P.J. AND LUPE, J. CONCUR.



On June 18, 1935 an order was entered directing the motion to  
vacate, entered June 15, 1934, be vacated. The  
order found, among the reasons therefor, that the  
trial judge had entered judgment, which is a  
fact which the defendant's attorney and his representative had  
on file. The order vacated the history of defendant's attorney,  
their representative, attorney and substitution; referred to the  
many months the motion had been pending and the numerous continuances  
granted; and stated the motion to vacate, and related matters, shall  
leave to court. The order does not show that defendant had  
obtained leave to file the affidavit of defense, and when it was  
filed he had not yet brought his motion, seeking to vacate the  
judgment, to a hearing. The trial court properly dismissed the  
affidavit.

The only change properly before the court was the trial  
order was entered on defendant's petition of July 17, 1935 and  
January 14, 1936, looking back from the findings in the trial order  
to the statement in the first petition, there was clearly no change  
shown why defendant was not present for the trial. It was purported  
to represent himself, he assumed the responsibility of selecting  
counsel and trial date. Furthermore, there is no attempt to show  
that defendant had a satisfactory defense to plaintiff's action. The  
court's finding stated that defendant had a "satisfactory defense" and  
is "not obligated" to testify. These conclusions were insufficient.  
If defendant had a defense he should have set in the facts which  
constituted it.

The petition was referred to the discretion of the trial  
court and, from what is here said, it should be clear that there  
was no basis for that discretion. The order is hereby affirmed.

ORDER AFFIRMED.

WATKINS, J. J. AND LUTZ, J. CONCUR.

42998

RE: THE ESTATE OF ANDERSON PALMER,  
DECEASED,

ROXIE MILLS,

Appellant,

v.

JOHN T. DEMPSEY, Administrator of  
Estate of Anderson Palmer, Deceased,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

306  
326 I.A. 254

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action by Roxie Mills to recover money held by Respondent, Administrator, as assets of decedent's estate on the ground that it is hers by virtue of a gift causa mortis. She appeals from an order entered in a trial de novo, following her appeal from the Probate Court, where her prayer was denied and petition dismissed.

May 1, 1940, sickness forced Anderson Palmer to his bed in his room at 4135 Langley Avenue, Chicago. May 18th he was removed to the Hines Memorial Hospital at Hines, Illinois, where he remained until he died intestate July 13, 1940. Several months thereafter the defendant Public Administrator took over administration of Palmer's Estate and plaintiff delivered to him a pass book covering Palmer's Savings Deposit of \$1,292.86 at the Drexel State Bank and three withdrawal slips two for \$600 each and one in blank. The slips had been filled in by plaintiff and signed by Palmer and were designed to withdraw the funds on deposit. The question is whether Palmer, before his death, made a gift of the funds on deposit to plaintiff.

Plaintiff had the burden of proving the gift by clear and convincing evidence. Barnum v. Reed, 136 Ill. 388; Rothwell v. Taylor, 303 Ill. 226; Keshner v. Keshner, 376 Ill. 354; Estate of Esther Williams v. Tuch, 313 Ill. App. 230. An essential



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no other evidence is shown as to whether the individual was

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The above is true in every case in which the above is true.

Don't expect that the Institute will have any effect on the situation.

[illegible]

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

[illegible]

Approved to the Board of Directors: \_\_\_\_\_

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 01-11-2010 BY 60322 UCBAW

Thereafter the defendant will discontinue any further

Page 3 of 10 of Approved Writing: Not subject to review or editing

CONFIDENTIAL

State Department and Bureau of Education for the Handicapped

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no convincing evidence.

1. Teitel, 200 TII, 200; Ruppert v. Ruppert, 200 TII, 201; Ruppert

[illegible]

element of the proof was that Palmer delivered the pass book and withdrawal slips to plaintiff with the intention to pass title to the funds on deposit, not irrevocably, as in the case of a gift inter vivos, but revocable in the event Palmer should recover from his illness. Barnum v. Reed. The evidence must show that Palmer when he gave plaintiff the symbols of his money intended that it should be hers absolutely unless he recovered. Simpson v. Heberlein, 259 Ill. App. 579.

The testimony is uncontroverted that May 18, 1940, Palmer sent for plaintiff, saying he had some business for her; that she went to his room and he gave her the pass book and withdrawal slips; that he made the delivery in the presence of Mrs. Casey and said that he wanted the latter to see that he was "giving this to 'Little Fella'"; that he told plaintiff to hold them; and that she understood she was to use the money according to directions he gave her. Mrs. Casey testified that Palmer said he was "leaving something behind" and "I leave it all stand with 'Little Fella'" and that he "was turning everything over to her give to her; said he was leaving everything all right."; that he had a brother whom he could not contact and who would not answer his letters; and that he was leaving everything to plaintiff because there was no one else to leave it to. Palmer's landlady testified that while he was in the hospital he wrote her that he was giving up the room and directing that his personal effects be given to plaintiff, and that she followed the directions. She did not present the note, because she said she had thrown it away.

In her sworn petition, plaintiff, among other things, stated that Palmer had given her the moneys with instructions that they belonged to her to use and distribute as he directed, and that he directed her to give certain portions of the money to his



element of the trust was that Palmer delivered the same book and  
withdrew all the money from the bank in the name of a gift  
the funds on deposit, not irrevocably, as in the case of a gift  
inter vivos, but revocable in the event Palmer should recover from  
his illness. Palmer v. Felt. The evidence must show that Palmer  
when he gave plaintiff the money intended that it  
should be held absolutely unless he recovered. Palmer v. Felt,  
258 Ill. App. 679.

The testimony is uncontroverted that May 18, 1940,  
Palmer sent for plaintiff, saying he had some business for her;  
that she went to his room and he gave her the book and with-  
drew all the money; that he said the delivery in the presence of Mrs.  
Gandy and said that he wanted the letter to say that he was giving  
this to "Little Felt"; that he told plaintiff to hold them; and  
that she understood she was to use the money according to directions  
he gave her. Mrs. Gandy testified that Palmer said he was "leaving  
something behind" and "I leave it all along with 'Little Felt'";  
and that he was turning everything over to her give to her; and  
he was leaving everything all right; that he had a brother whom  
he could not contact and who would not answer his letters; and that  
he was leaving everything to plaintiff because there was no one else  
to leave it to. Palmer's landlady testified that while he was in  
the hospital he wrote her that he was giving up the room and directing  
that his personal effects be given to plaintiff, and that she followed  
the directions. She did not present the note, because she said she  
had thrown it away.

In her sworn petition, plaintiff, among other things,  
stated that Palmer had given her the money with instructions that  
they belonged to her to use and distribute as she directed, and  
that he directed her to give certain portions of the money to his

brother in Mississippi. Defendant introduced in evidence a letter written by plaintiff to Palmer's brother in which she advised the brother of Palmer's death and said that "all he told me to let you have is yours." She asked whether the Hospital had sent the brother Palmer's clothing and said that she could not send anything until she had an order of court; that she was trying to keep the State from taking everything and that, "All I have is yours, but I can't move it on account of your negligence." She advised him to have his lawyer read her letter and stated that she had hired a lawyer to save Palmer's earnings "for you and myself too." Defendant also introduced a post card from plaintiff to Palmer's brother, advising him that he would be dealt with "justly".

Defendant points to plaintiff's failure to exercise any act of ownership over the moneys from the date of Palmer's death, July 13, 1940 until April 17, 1943, when she left the pass book and slips in court. While that fact is not controlling, it is entitled to weight against plaintiff's claim. In re Estate of Antkowski, 286 Ill. App. 184. The record does not disclose clear and convincing proof of the requisite intent. In evaluating the evidence, in this case, observation of the witnesses was very important. The trial court had the benefit of observing the witnesses and we cannot say that it should have held that plaintiff had established a gift causa mortis. It can be said with greater force that a gift inter vivos was not established.

For the reasons given the order of the Circuit Court is affirmed.

ORDER AFFIRMED.

BURKE, P.J. AND LUPE, J. CONCUR.



...in January, 1945. Defendant introduced in evidence a letter

written by defendant to Palmer's brother in which she advised the

brother of Palmer's death and said that "All he told me to let

you have is yours." She asked whether the Hospital had sent the

brother Palmer's clothing and said that she could not send anything

until she had an order of court; that she was trying to keep the

clothes from falling everything and that "All I have is yours, but

I can't move it on account of your negligence." She advised him to

have his lawyer look her letter and stated that she had hired a

lawyer to save Palmer's clothing "for you and myself too." Defendant

also introduced a post card from defendant to Palmer's brother,

saying that she would be back with "Hasty".

Defendant points to Plaintiff's failure to exercise any

act of ownership over the money from the date of Palmer's death,

July 15, 1940 until April 18, 1945, when she left the pass book and

also in court. While that fact is not controlling, it is entitled

to weight against Plaintiff's claim. In re Estate of Antkowiak,

380 Ill. App. 194. The record does not disclose clear and convincing

proof of the predicate intent. In evaluating the evidence, in this

case, observation of the witnesses was very important. The trial

court had the benefit of observing the witnesses and we cannot say

that it should have held that Plaintiff had established a gift

caused mortis. It can be said with greater force that a gift inter vivos

was not established.

For the reasons given the order of the Circuit Court is

affirmed.

ORDER AFFIRMED.

MUNKE, E. J. AND LANE, J. POWERS.

43109

SAM LEVY,

Appellant,

v.

CHARLES D. BERNARD, doing business as  
BERNARD BOX COMPANY,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

326 I.A. 254<sup>2</sup>

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

On July 1, 1943, plaintiff confessed judgment for rent under a written lease with defendants for \$2,510.62 and costs for half of the month of January and the months of February, March, April, May, June and July, 1943 at \$375 per month less credits and including attorney's fees. August 2, 1943 plaintiff by eliminating rentals for June and July and modifying the attorney's fees reduced the judgment to \$1,723.12 and costs. On that day the court under agreement of the parties opened the judgment and permitted the defendant to make a defense. February 9, 1944 the judgment of August 2, 1943 was reduced to \$678.75. Plaintiff appeals.

The written lease between the parties was made June 11, 1941, to expire December 31, 1948. The term rental was \$35,200.00, payable \$250 in July 1941 and the balance in 26 installments of \$375 and 63 installments of \$400, payable monthly. In February 1943, defendant, distressed financially, met with plaintiff's agent Siegel and entered into a parol agreement, modifying the rental terms of the lease. Thereafter, on March 5, 1943, defendant gave Siegel one check for \$50 and one for \$25 and on May 1st another check for \$50. Prior to May 15, he sent Siegel a check for \$150, postdated May 15 and endorsed "In full settlement of all claims and accounts \* \* \*." The postdated check was returned to defendant in a letter by Siegel which indicated that the reason for returning it was the endorsement.



RAY LEVY,

Appellant,

v.

CHARLES F. BERNARD, doing business as  
BERNARD BOX COMPANY,

Appellee.

CITIZEN TRUST

TRUST COMPANY

OF CHICAGO,

3201 A. 254

MR. JUSTICE CLARK delivered the opinion of the court.

On July 1, 1943, plaintiff confessed judgment for rent

under a written lease with defendants for \$2,510.63 and costs

for half of the month of January and the month of February, March,

April, May, June and July, 1943 at \$275 per month less credits

and including attorney's fees. August 2, 1943 plaintiff by stip-

ulating rentals for June and July and modifying the attorney's

fees reduced the judgment to \$1,728.12 and costs. On that day the

court under agreement of the parties opened the judgment and

permitted the defendant to make a defense. February 9, 1944 the

judgment of August 2, 1943 was reduced to \$678.75. Plaintiff appeals.

The written lease between the parties was made June 11,

1941, to expire December 31, 1948. The term rental was \$5,200.00,

payable \$250 in July 1941 and the balance in 24 installments of

\$275 and 24 installments of \$400, payable monthly. In February 1943,

defendant, distressed financially, met with plaintiff's agent Daniel

and entered into a verbal agreement, modifying the rental terms of

the lease. Hereafter, on March 6, 1943, defendant gave Daniel one

check for \$50 and one for \$25 and on May 1st another check for \$50.

Prior to May 15, he sent Daniel a check for \$50, postdated May 15

and endorsed "In full settlement of all claims and accounts" " " " "

The postdated check was returned to defendant in a letter by

Daniel which indicated that the reason for returning it was the

endorsement.

The question is whether the three checks accepted and cashed by plaintiff totaling \$125 were for March, one half of April and for May rent under the parol agreement as defendant contends; or as payments on account of the rent due for half of January and all of February on the basis of \$375 per month, as plaintiff contends.

A parol agreement to reduce the rental terms in a written lease will not be disturbed if it has been executed by the parties. Snow v. Griesheimer, 220 Ill. 106; Levy v. Greenberg, 261 Ill. App. 541; Camp v. Munger's Laundry, 303 Ill. App. 656; McCarthy v. Katin, et al., 318 Ill. App. 639. Moreover, the reductions are separate and distinct items each month and, when paid and accepted, constitute an executed, complete and irrevocable gift and the amount of the reduction cannot be recovered. Levy v. Greenberg, 261 Ill. App. 541. Accordingly, if the evidence supports the contention of the defendant, plaintiff was entitled to recover only the amount due under the written lease for half of January and all of February and \$25 for the month of April. On the other hand, if the evidence supports the plaintiff's contention, the parol agreement cannot stand since it is exeautory and plaintiff is entitled to recover according to the terms of the written lease for the months of March, April and May, as well as for half of January and the month of February.

The trial court in sustaining defendant's position determined that the parties intended that the three checks should be applied to March, April and May rent. Siegel testified that the parol agreement of February 12th required that defendant pay the rent due under the written lease for January and February within two days and that only in that event would the rent for March, April and May, subject to plaintiff's approval, be reduced to \$50. The evidence showed, however, that defendant did not make the January and February payments within two days and, nevertheless,



The question is whether the terms of the lease were intended to be paid by plaintiff monthly. It was for March, one half of April and for May rent under the parcel agreement as defendant contends; or as payments on account of the rent due for half of January and all of February on the basis of \$25 per month, as plaintiff contends.

A parcel agreement to reduce the rental terms in a written lease will not be introduced if it has been executed by the parties. How v. Christensen, 230 Ill. 100; Levy v. Greenberg, 201 Ill. App. 541; Levy v. Greenberg's Laundry, 208 Ill. App. 536; McCarthy v. Kania, 218 Ill. App. 322. Moreover, the regulations are separate and distinct items each month and, when paid and accepted, constitute an executed, complete and irrevocable gift and the amount of the reduction cannot be recovered. Levy v. Greenberg, 201 Ill. App. 541. Accordingly, if the evidence supports the contention of the defendant, plaintiff was entitled to recover only the amount due under the written lease for half of January and all of February and \$25 for the month of April. On the other hand, if the evidence supports the plaintiff's contention, the parcel agreement cannot stand since it is executory and plaintiff is entitled to recover according to the terms of the written lease for the months of March, April and May, as well as for half of January and the month of February.

The trial court in sustaining defendant's position determined that the parties intended that the checks should be applied to March, April and May rent. It is testified that the parcel agreement of February 15th recited that defendant pay the rent due under the written lease for January and February within two days and that only in that event would the rent for March, April and May, subject to plaintiff's approval, be reduced to \$20. The evidence shows, however, that defendant did not make the January and February payments within two days and, nevertheless,

Seigel on March 5 called upon defendant and requested "\*\* \* some rent, even \$10 or \$5 \* \* \*" and accepted the two checks totaling \$75 and later, May 1, accepted a further check for \$50. It was the view of the trial court that the conduct of Siegel was inconsistent with the theory that the reduced rental agreement was dependent upon the payment of January and February rentals within two days. Siegel said that he applied the checks upon the January and February rent, but did not discuss the application with defendant. Plaintiff testified that he did not know on what months these checks were to be applied. Defendant testified that when he gave the checks to Siegel in March, he explained the money was for March rent and part of the April rent, and that he had no conversation about the application of the check dated May 1st. He also testified that he had no further conversation about the application of the checks, and that he did not "owe plaintiff for any rent for March or May, but owed him \$25 for April". He denied any agreement to pay the January and February rent within two days of February 12. On final examination by the court, defendant testified that he had no conversation with Siegel about the application of the checks given March 5th.

The plaintiff contends that since defendant did not direct Siegel to apply the three checks for the then current rents, that plaintiff had the right to make the application as he pleased. Defendant argues that no application was actually made to the January and February rents and that Siegel's testimony regarding the application indicates a mere mental application, especially in view of the fact that no books or records were kept by plaintiff of the rentals. The question is what the intention of the parties was at the time the checks were received by Siegel. The court found that the intention was that the checks should be applied to March, April and May rents. Both parties rely upon Liese v. Hentze, 326 Ill. 633,



subject on March 3, 1915 upon defendant's request. "I was  
 rent, even \$10 or \$15, and suggested that the case be settled  
 75 and later, say 1, suggested a further check for \$50. It was  
 the view of the trial judge that the amount of \$100 was in-  
 consistent with the theory that the reduced rental agreement was  
 dependent upon the payment of January and February rentals within  
 two days. Plaintiff said that he applied the checks when the January  
 and February rent, but did not discuss the application with defendant.  
 Plaintiff testified that he did not know on what date these  
 checks were to be applied. Defendant testified that when he gave  
 the checks to Alford in March, he explained the money was for March  
 rent and part of the April rent, and that he had no conversation  
 about the application of the checks dated May 1st. He also testified  
 that he had no further conversation about the application of the  
 checks, and that he did not have plaintiff for any rent for March  
 or May, but paid him \$100 for April. He denied any agreement to  
 pay the January and February rent within two days of February 1st.  
 On final examination by the court, defendant testified that he had  
 no conversation with Alford about the application of the checks  
 given March 3rd.  
 The plaintiff contends that Alford defendant did not direct  
 Alford to apply the three checks for the then current rents, that  
 plaintiff had the right to make the application as he pleased.  
 Defendant argues that no application was actually made to the January  
 and February rents and that Alford's testimony regarding the applica-  
 tion indicates a more mental application, especially in view of the  
 fact that no books or records were kept by plaintiff of the rentals.  
 The question is what was the intention of the parties at the time  
 the checks were received by Alford. The court found that the  
 intention was that the checks should be applied to March, April and  
 May rents. Both parties rely upon Blase v. Blase, 220 Ill. 633,

for the proper rule upon the question of application of payments by a debtor. The court there said that the debtor may control the application and, if he does not do so, the creditor may apply as he chooses. It states further, however, that in the absence of an exercise of the right by either party, the court may make such application as is just and equitable. The plaintiff argues that the checks indicate the defendant's intention to make payments on the January and February rent; that if defendant was distressed financially, he would not be paying \$25 in advance March 5 on the April rent, nor would he on May 1st pay but \$50 when he owed not only \$50 for May, but the balance for April and that moreover, the post-dated check cannot be explained under defendant's theory. According to Siegel, defendant on March 5th spoke of an order from Washington and seemed quite anxious for a lease. This may explain why he paid \$75 instead of \$50 at that time; or it may be that all of these considerations presented by plaintiff may be answered by pointing to defendant's financial distress in which he made payments as he found money available. Defendant testified that "I had to hurt myself" to give the \$150 check, but that Siegel wanted the money badly and I wanted to stay there a little bit longer. He denied that the \$150 check was for application on the January and February rent, saying he sent it for another reason. He did not explain the reason, nor did Siegel rebut the testimony that he wanted money badly in May.

Under these circumstances and in view of indefinite testimony on the vital issue, it was important for the trial court to observe the witnesses closely and to determine the meaning of the defendant's testimony. He was in a better position than we are to gather the meaning of the witnesses from all their testimony. Under the circumstances we believe that we should not disturb the judgment and it is hereby affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND LUPE, J. CONCUR.



For the proper rule upon the question of application of payment  
by a debtor. The court there said that the debtor may control  
the application and, if he does not do so, the creditor may apply  
as he chooses. It states further, however, that in the absence  
of an exercise of the right of election by the creditor, the  
such application as is just and equitable. The plaintiff argues  
that the check indicates the defendant's intention to make payment  
of the January and February rent; that if defendant was distressed  
financially, he would not be paying \$50 in advance which is on the  
April rent, nor would he on May 1st pay but \$50 when he owed not  
only \$50 for May, but the balance for April and that moreover, the  
post-dated check cannot be explained unless defendant's theory,  
according to which, defendant on March 25th spoke of an order from  
Washington and showed this order for a check. This may explain  
why he paid \$75 instead of \$50 at that time; or it may be that all  
of these considerations presented by plaintiff may be answered by  
pointing to defendant's financial distress in which he made payments  
as he found money available. Defendant testified that "I had to  
hurt myself" to give the \$75 check, but that check was the  
money badly and I wanted to stay there a little bit longer. He  
denied that the \$50 check was for application on the January and  
February rent, saying he sent it for another reason. He did not  
explain the reason, nor did he say about the testimony that he  
wanted money badly in May.  
Under these circumstances and in view of indefinite testimony  
on the vital issue, it was important for the trial court to observe  
the witnesses closely and to determine the meaning of the defendant's  
testimony. He was in a better position than we are to gather the  
meaning of the witness' words in this testimony. Under the  
circumstances we believe that we should not disturb the judgment  
and it is hereby affirmed.

JUDGMENT AFFIRMED.

42536

JOHN F. SNIEGOWSKI, Adm'r. of the  
Estate of Raymond J. Sniegowski,  
Deceased,

Appellant,

v.

EDWARD L. REECE and GEORGE W.  
KLEIN,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

326 I.A. 255

MR. JUSTICE LUPE DELIVERED THE OPINION OF THE COURT.

This action was instituted by the administrator of the estate of Raymond J. Sniegowski, deceased, to recover damages arising out of the alleged wrongful death of plaintiff's intestate, occurring as the result of a collision between an automobile operated by the decedent and a truck owned by defendant George W. Klein and driven by defendant Edward L. Reece. At the conclusion of the evidence offered on behalf of plaintiff, the trial court sustained the motion to instruct the jury to find the defendants not guilty. The jury returned a verdict as directed, and judgment was entered thereon. Plaintiff appealed.

The collision occurred at about half past two o'clock in the morning of Saturday, March 22, 1941, on Main street at a point east of Lemont and west of the intersection of Main street and Illinois street which comes into Main street from the southwest on a slant and merges into Main street as that highway continues east. Main street is an 18-foot concrete highway which passes through Lemont and runs east and west with a slight curve toward the south. Both highways are concrete and after their merger into one highway are known as Illinois Route 4A. As Illinois street approaches Main street from the southwest it slopes downward slightly to meet the grade of Main street. The latter highway slopes upward gradually toward the intersection. This causes a hump in the merging highways which continues for about 40 feet east of the intersection. The



JOHN F. BIRCHALL, Plaintiff,  
 vs.  
 Estate of Raymond J. Bircowick, Defendant.

3261A.252

MR. JUSTICE LUTHER WILSON FOR THE COURT.

This action was instituted by the administrator of the

estate of Raymond J. Bircowick, deceased, to recover damages

arising out of the alleged wrongful death of plaintiff's intestate,

occurring as the result of a collision between an automobile

operated by the deceased and a truck owned by defendant George W.

Klein and driven by defendant Edward J. Reese. At the conclusion

of the evidence offered on behalf of plaintiff, the trial court

sustained the motion to instruct the jury to find the defendants

not guilty. The jury returned a verdict in favor of the plaintiff and judgment

was entered thereon. Plaintiff appealed.

The collision occurred at about half past two o'clock in

the morning of Saturday, March 22, 1941, on Main street at a point

east of Belmont and west of the intersection of Main street and

Illinois street which opens into Main street from the southwest on

a slight curve into Main street as that highway continues west.

Main street is an 18-foot concrete highway which passes through

Belmont and runs east and west with a slight curve toward the south.

Both highways are concrete and after their merger into one highway

are known as Illinois Route 4. As Illinois street approaches

Main street from the southwest it slopes downward slightly to meet

the grade of Main street. The latter highway slopes upward gradually

toward the intersection. This causes a bump in the merging highway

which continues for about 40 feet east of the intersection. The

merged highways slope downward from the intersection. Throughout this convergence, the north side of Main street remains approximately level but the south edge of Illinois street is about 16 inches lower than the north edge of Illinois street and is about 14 inches lower than the north edge of Main street as the two highways converge. West of the intersection of Illinois and Main streets is a private gravel road running approximately north and south and crossing Main street. The decedent lived about four blocks south of Main street. Friday evening and early Saturday morning he had been bowling in Lundeen's bowling alleys in Lemont and four blocks west of the scene of the accident; there was a tavern attached to the alleys. He left the bowling alleys at about two o'clock Saturday morning, driving a 1939 Chevrolet automobile. It was a fair and clear night with good visibility. The deceased was next seen after the accident, lying on the front seat of his automobile, which was then standing north of Main street about 200 feet west of the above intersection, headed west toward Lemont; decedent was unconscious and badly injured; he died shortly thereafter.

There were no eye-witnesses to the accident. There was, therefore, no direct evidence as to the directions in which the truck and the automobile were being driven prior to the collision. Plaintiff's evidence, however, established the following facts: that the truck, which was admittedly owned by the defendant Klein and driven by defendant Reece, was a gasoline truck or tractor, of trailer type, with dual wheels; that after the accident the truck was found demolished and in flames, lying across Main street about 35 feet west of the intersection of Main and Illinois streets; that its wheels were in the air; that it was headed southeast, lying at a 40-degree angle across Main street, except for two or three feet along its south side;



larged highways along toward from the intersection. Throughout this convergence, the north side of Main street remains approximately

level but the south edge of Illinois street is about 10 inches lower than the north edge of Illinois street and is about 14 inches lower than the north edge of Main street as the two highways converge.

West of the intersection of Illinois and Main streets is a private gravel road running approximately north and south and crossing Main street. The defendant lived about four blocks south of Main street.

Friday evening and early Saturday morning he had been bowling in

Lundeen's bowling alley in Mount and four blocks west of the scene of the accident; there was a tavern attached to the alley. He left the bowling alley at about two o'clock Saturday morning,

driving a 1933 Chevrolet automobile. It was a fair and clear night with good visibility. The deceased was next seen after the accident, lying on the front seat of his automobile, which was then standing north of Main street about 200 feet west of the above intersection, headed west toward Mount; deceased was unconscious and badly injured; he died shortly thereafter.

There were no eye-witnesses to the accident. There was, therefore, no direct evidence as to the direction in which the truck and the automobile were being driven prior to the collision. Plaintiff's evidence, however, established the following facts: that the truck,

which was admittedly owned by the defendant Main and driven by defendant Reese, was a gasoline truck or tractor, of trailer type, with dual wheels; that after the accident the truck was found demolished and in flames, lying across Main street about 25 feet west of the intersection of Main and Illinois streets; that its wheels were in the air; that it was headed southeast, lying at a 40-45 degree angle across Main street, except for two or three feet along its south side;

that the point of contact between the two vehicles was about 35 feet west of where the truck was lying or about 75 feet west of the above intersection; that there was one impact mark on the left front side of the truck, back of the cab, on the tank; that there were marks all over the truck; that the left rear wheels and axle of the tractor, which had been severed from the truck, were lying to the south of Main street across Illinois street, about 25 feet away.

John Pociask, the Chief of Police of Lemont, a witness of plaintiff's, testified on cross examination that he had testified before the Coroner's inquest that the truck had not hit the "sway" in the road before the collision occurred. Other witnesses testified on behalf of plaintiff that the decedent's Chevrolet car was found standing about 200 feet west of the truck, north of Main street, headed west toward Lemont; that its entire left side was demolished; that its running board, headlight glass, and windshield glass were found lying on the north side of the pavement of Main street about 30 feet west of the truck and about at the point of collision; that its left front wheel, which had been knocked off, was lying to the north of Main street, off the pavement, about 35 feet west of the truck; that the tire of the wheel was also lying on the north side of Main street. Witness Pociask, the only witness who was interrogated on the point, testified that he had found no tire marks made by the truck on the south half of Main street; later, on re-cross examination, he stated that he had found a marking, tire marks, on the pavement on the south half of Main street; and on cross-examination he admitted that at the Coroner's inquest he had testified that, "brake marks of the truck were on his side of the road"; "showed where he applied his brakes for 8 to 10 feet." He further testified that he later found that the tire marks on the north half of the roadway were not the tire marks of the truck. He further stated that, with the above exception, the only other mark he found on the pavement was a straight groove-like mark or scratch, about 18 to 24 inches long, running



that the point of contact between the two vehicles was about 35 feet west of where the truck was lying or about 75 feet west of the above intersection; that there was one impact mark on the left front side of the truck, back of the cab, on the roof; that there were marks all over the truck; that the left rear wheels and axle of the tractor, which had been severed from the truck, were lying to the south of Main Street across Illinois Street, about 3 feet away.

John Poolman, the Chief of Police of Lemont, a witness of plaintiff's, testified on cross examination that he had testified before the Coroner's inquest that the truck had not hit the "way" in the road before the collision occurred. Other witnesses testified on behalf of plaintiff that the decedent's Chevrolet car was found standing about 200 feet west of the truck, north of Main Street, headed west toward Lemont; that its entire left side was demolished; that its running board, headlight glass, and windshield glass were found lying on the north side of the pavement of Main Street about 50 feet west of the truck and about at the point of collision; that its left front wheel, which had been knocked off, was lying to the north of Main Street, off the pavement, about 55 feet west of the truck; that the tire of the wheel was also lying on the north side of Main Street. Witness Poolman, the only witness who was interviewed on the point, testified that he had found no tire marks made by the truck on the south half of Main Street; later, on re-cross examination, he stated that he had found a marking, tire marks, on the pavement on the south half of Main Street; and on cross-examination he admitted that at the Coroner's inquest he had testified that "brake marks of the truck were on his side of the road"; "showed where he applied his brakes for 8 to 10 feet." He further testified that he later found that the tire marks on the north half of the roadway were not the tire marks of the truck. He further stated that, with the above exception, the only other mark he found on the pavement was a straight groove-like mark or scratch, about 18 to 24 inches long, running

straight east and west, lying about 18 to 20 inches north of the middle line of Main street, about 30 feet west of the truck, at about the point of collision, and that this mark was just enough to scrape the surface of the pavement and was just such a mark as one might expect if an axle had gone down and been carried along on the road, the concrete being broken at that point; and that this mark "wasn't made by the truck". Two witnesses testified on behalf of the plaintiff that the decedent enjoyed a reputation as a careful and prudent driver, and was a careful and prudent driver. The evidence shows that the speedometer needle on deceased's Chevrolet automobile, when examined after the accident, was frozen at 40 miles per hour.

Counsel for all parties agree, in substance, that a motion to direct a verdict for the defendant preserves for review only the question of law whether from the evidence in favor of plaintiff, standing alone, and when considered to be true, together with the inferences which may legitimately be drawn therefrom, the jury might reasonably have found for the plaintiff. (Zirald v. Lynch Co., 365 Ill. 197, 199; Brophy v. Illinois Steel Co., 242 Ill. 55; City of Chicago v. Jarvis, 226 Ill. 614.) Conversely, "in the absence of evidence on which a jury could in the eye of the law reasonably find in favor of the party holding the affirmative of an issue, a motion to direct a verdict against the party so holding the affirmative should be allowed. (American National Bank v. Woolard, 342 Ill. 148, 155.)

It is also indisputable that the plaintiff, in sustaining the burden of proving the affirmative of an issue, is not restricted to proving it by direct evidence, but may prove it by circumstantial evidence. (Norkevich v. Atchison, T. & S. F. Ry. Co., 263 Ill. App. 1, 5; Devine v. Delano, 272 Ill. 166, 179-180.) Circumstantial evidence consists of proof of facts and circumstances from which the jury may infer (without direct evidence thereof) other connected facts which



straight west and west, lying about 15 to 20 inches north of the  
middle line of main street, about 30 feet west of the truck, at  
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222 Ill. 127, 128; People v. Illinois Steel Co., 222 Ill. 127, 128; City  
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25.)  
It is also incumbent that the plaintiff, in maintaining  
his burden of proving the affirmative of an issue, is not restricted  
to proving it by direct evidence, but may prove it by circumstantial  
evidence. (Worcester v. Worcester, 7 N.E. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.)

usually and reasonably follow from the proven facts and circumstances; those connected facts are then said to have been proved by circumstantial evidence. But it cannot be said that the existence of fact a, may thus be inferred from the evidence when the existence of fact b, inconsistent with fact a, can be inferred with equal certainty. In the case of Condon v. Schoenfeld, 214 Ill. 226, at page 230, the court said:

"It cannot be said that the existence of a certain fact may reasonably be inferred from the evidence when the existence of another fact inconsistent with the first can be, from the same evidence, inferred with equal certainty."

The late Mr. Justice McSurely of our Appellate Court, in the case of Coffin v. Chicago City Ry. Co., 251 Ill. App. 169, at page 174, said:

"Whatever may be the law elsewhere, it is the rule in this state, established by a large number of decisions, that the existence of a certain fact cannot be reasonably inferred from the evidence when the existence of another fact, inconsistent with the first, can be inferred from the same evidence with equal certainty; a fact cannot be established by circumstantial evidence unless the circumstances are of such a nature and so related to each other that it is the only conclusion that can be drawn therefrom.

"It cannot be said that the existence of a certain fact may reasonably be inferred from the evidence when the existence of another fact inconsistent with the first can be, from the same evidence, inferred with equal certainty. The evidence must point to the existence of some particular fact, rather than to the existence of another fact inconsistent with the first, before it can be said that such evidence alone tends to prove the existence of the first." Chicago Union Traction Co. v. Hampe, 228 Ill. 346."

Very pertinent to the instant case is the language of Mr. Justice Dunn in Peterson & Co. v. Industrial Board, 281 Ill. 326, 330:

"Any of these suppositions is as consistent with the evidence as any other and all are mere conjecture. Liability cannot rest upon imagination, speculation or conjecture, upon a choice between two views equally compatible with the evidence, but must be based upon facts established by evidence fairly tending to prove them."

In the case of Neal v. Chicago, R. I. & P. Ry. Co., 129 Iowa, 5, cited with approval in Ohio Bldg. Vault Co. v. Indus. Board, 277 Ill. 96, the rule is thus quoted from Asbach v. Chicago, B. & Q. R. Co., 74 Iowa, 248, at 250:

"A theory cannot be said to be established by circumstantial evidence,



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those connected facts are then said to have been proved by inference.

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may thus be inferred from the evidence when the inference of fact A

inconsistent with fact A, can be inferred with equal certainty. In

the case of London v. Johnson, 212 Ill. 290, 80 Cal. 230, 231

court said:

"It cannot be said that the existence of a certain fact may reasonably  
be inferred from the evidence when the existence of another fact  
inconsistent with the first can be, from the same evidence, inferred  
with equal certainty."

The late Mr. Justice Kennedy of our Appellate Court, in the case

of Goffin v. United City B. Co., 231 Ill. App. 288, 80 Cal. 230, 231, said:

"However may be the law elsewhere, it is the rule in this  
state, and followed by a large number of decisions, that the existence  
of a certain fact cannot be reasonably inferred from the evidence  
when the existence of another fact, inconsistent with the first, can  
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views equally compatible with the evidence, but must be based upon  
facts established by evidence fairly tending to prove them."

In the case of Leaf v. Chicago, M. & St. P. Ry. Co., 128 Iowa, 21

after with approval in Ohio River Valley Co. v. Indiana Power Co., 231 Ill.

28, the rule is thus stated: Chicago, M. & St. P. Ry. Co.

21 Iowa, 248, at 250:

"A theory cannot be said to be established by circumstantial evidence,

even in a civil action, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent, merely, with that theory, for that may be true, and yet they may have no tendency to prove the theory. This is the well-settled rule, and it is manifest that under it plaintiff's theory is not established."

In the case of Kelley v. Public Service Co., 300 Ill. App. 354, the same doctrine is followed, the court saying at pages 361-362:

"A theory cannot be said to be established by circumstantial evidence unless the facts are of such a nature and so related as to make it the only conclusion that could reasonably be drawn. It cannot be said one fact can be inferred, when the existence of another inconsistent fact can be drawn with equal certainty."

Since there were no eye-witnesses to the accident in the instant case, the plaintiff necessarily had to prove due care on the part of decedent and negligence on the part of the defendant truck driver, by circumstantial evidence.

As to the issue of due care on the part of decedent, plaintiff relied upon the legal presumption that all persons observe the instincts of promoting the preservation of life, and the testimony of two witnesses called on behalf of plaintiff showed that decedent was a careful and prudent driver and enjoyed a reputation as such. To refute this legal presumption, the defendants rely upon the indisputable fact that the speedometer on decedent's Chevrolet car was frozen at 40 miles per hour immediately after the accident, and that his car was found between 190 and 225 feet west of the point of impact of the truck and decedent's car.

Under the evidence, we could not uphold the trial court's action in directing the verdict on the theory alone that the plaintiff had failed to establish the element of due care on the part of decedent. There remains, however, the issue as to the negligence of the defendant truck driver. The complaint contained the usual charge of general negligence in the operation of the truck



even in a civil action, where the law is not so strict, and the burden of proof is not so heavy, it is the duty of the jury to find the facts as they appear, and not to speculate or guess. In the case of Smith v. Smith, 100 Ill. 100, 101, the court said: "It is not sufficient to say that the defendant is guilty, but it is necessary to show that the defendant is guilty of the crime charged. This is the duty of the jury, and it is not to be discharged by the court."

In the case of Smith v. Smith, 100 Ill. 100, 101, the court said:

the same question is involved, the court said at page 101-102:

"A theory cannot be said to be established by circumstantial evidence unless the facts are of such a nature and so related as to make it the only conclusion that can be reasonably drawn. It cannot be said that the facts are of such a nature and so related as to make it the only conclusion that can be reasonably drawn. It cannot be said that the facts are of such a nature and so related as to make it the only conclusion that can be reasonably drawn."

Since there was no evidence as to the defendant in the

fact of the case, the plaintiff necessarily had to prove the facts on the

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and also several charges of specific acts of negligence. It cannot be contended that there was any evidence to support the charges of specific acts of negligence other than the charge that the truck was operated on the wrong side of the highway and in the lane of traffic in which the decedent's Chevrolet car was properly proceeding. The main issue in the case, therefore, is whether from the evidence in favor of plaintiff, standing alone, and when considered to be true, together with the inferences which may legitimately be drawn therefrom, the jury might reasonably have found for the plaintiff on either the charge of general negligence in the operation of the truck, or the charge of the specific act of negligence in the operation of the truck on the left or wrong side of the highway. Plaintiff's allegation charging general negligence in the operation of the truck has resolved itself into a charge of a specific act of negligence, namely, the act of driving the truck on the wrong side of the highway (on the north side of Main street) while proceeding in an easterly direction. The circumstantial evidence adduced by plaintiff in support of that charge consisted of the following: (1) That there was the aforesaid hump in the highway beginning at the intersection of Main and Illinois streets, lying largely in the south half of Main street, and the truck driver probably drove into the north half of Main street to avoid the hump; (2) that the running board, headlight glass, and windshield glass of the Chevrolet car were found on the pavement, north of the center line of Main street; (3) that there was a mark or groove, or scratch, 18 to 24 inches long, extending east and west, making a break in the concrete pavement on the north half of Main street, which the plaintiff's brief (at page 14) erroneously describes as "extending east and west and north to the center line of the pavement," but which his witness, at page 98 of the record, placed at "18 to 20 inches north of the center line"; and



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and also several charges of specific acts of negligence. It cannot be contended that there was any evidence to support the charges of specific acts of negligence other than the charge that the truck was operated on the wrong side of the highway and in the lane of traffic in which the decedent's Chevrolet car was properly proceeding. The main issue in the case, therefore, is whether from the evidence in favor of plaintiff, standing alone, and when considered to be true, together with the inferences which may legitimately be drawn therefrom, the jury might reasonably have found for the plaintiff on either the charge of general negligence in the operation of the truck, or the charge of the specific act of negligence in the operation of the truck on the left or wrong side of the highway. Plaintiff's allegation charging general negligence in the operation of the truck has resolved itself into a charge of a specific act of negligence, namely, the act of driving the truck on the wrong side of the highway (on the north side of Main street) while proceeding in an easterly direction. The circumstantial evidence adduced by plaintiff in support of that charge consisted of the following: (1) That there was the aforesaid bump in the highway beginning at the intersection of Main and Illinois streets, lying largely in the south half of Main street, and the truck driver probably drove into the north half of Main street to avoid the bump; (2) that the running board, headlight glass, and windshield glass of the Chevrolet car were found on the pavement, north of the center line of Main street; (3) that there was a mark or groove, or rut, 18 to 24 inches long, extending east and west, making a break in the concrete pavement on the north half of Main street, which the plaintiff's brief (at page 14) erroneously describes as "extending east and west and north to the center line of the pavement," but which his witness, at page 98 of the record, placed at "18 to 20 inches north of the center line"; and

(4) that the tire or brake marks of the truck were allegedly found on the north side of Main street. Each of the above circumstances has been carefully considered, together with all inferences which may legitimately be drawn therefrom. As to the probability that the truck driver drove to the north of the center of Main street as he approached the intersection of Illinois street, in order to avoid the hump which began at that intersection, that probability appears as sheer speculation or conjecture in the absence of any other evidence that he did so drive into the wrong side of the highway. The inference drawn by plaintiff, that the truck driver would drive over to the wrong side to avoid a hump which was no higher than that which is caused by a variation of 16 inches between two sides of the road, is certainly less reasonable, than the inference that defendant's instinct of self-preservation would restrain him from driving into the path of a vehicle approaching from the opposite direction. Under the tests laid down in Gordon v. Schoenfeld, 214 Ill. 226, and Coffin v. Chicago City Ry. Co., 251 Ill. App. 169, the inference that the truck was being driven on the left of the center of Main street could not be reasonably inferred from the circumstance of the hump, even if the truck driver's awareness of its existence could be inferred. Reference is made by the plaintiff to the finding of headlight glass and windshield glass of the Chevrolet on the north half of the pavement of Main street, which he contends is indicative of the truck having crossed over to the left of the middle of the highway. Plaintiff further argues that as the left front wheel of the Chevrolet and the tire torn therefrom being found on the north side of Main street, plus the fact that the Chevrolet was found at least 190 feet west of the truck, and north of the center line of Main street, after the collision, is an indication that the Chevrolet was traveling on its proper side of the road.



(4) That the tire or brake marks of the truck were allegedly found on the north side of Main Street. Each of the above circumstances has been carefully considered, together with all inferences which may legitimately be drawn therefrom. As to the probability that the truck driver drove to the north of the center of Main Street as he approached the intersection of Illinois Street, in order to avoid the bump which began at that intersection, that probability appears as sheer speculation or conjecture in the absence of any other evidence that he did so drive into the wrong side of the highway. The inference drawn by plaintiff, that the truck driver would drive over to the wrong side to avoid a bump which was no higher than that which is caused by a variation of 1/2 inches between two sides of the road, is certainly less reasonable, than the inference that defendant's instant of self-observation would restrain him from driving into the path of a vehicle approaching from the opposite direction. Under the facts laid down in Condon v. Schoenfeld, 214 Ill. 420, and Giffin v. Chicago City Ry. Co., 251 Ill. App. 129, the inference that the truck was being driven on the left of the center of Main Street could not be reasonably inferred from the circumstance of the bump, even if the truck driver's awareness of its existence could be inferred. Reference is made by the plaintiff to the finding of headlight flash and windshield glass of the Chevrolet on the north half of the pavement of Main Street, which he contends is indicative of the truck having crossed over to the left of the middle of the highway. Plaintiff further argues that as the left front wheel of the Chevrolet and the tire torn therefrom being found on the north side of Main Street, and the fact that the Chevrolet was found at least 180 feet west of the truck, and north of the center line of Main Street, after the collision, is an indication that the Chevrolet was traveling on the proper side of the road.

Plaintiff's witness Joseph Pociask, chief of police of Lemont, testified that the mark of impact on the truck was back of the cab and about a foot back of the front end of the tank. If the front or the left front end of the truck had struck the Chevrolet, some evidence of damage to that part of the truck, at least in the form of broken glass, would have been available. As a matter of fact, the only evidence as to the damage to the truck was that the rear wheels and axle of the truck were found some distance south of Main street. We are of the opinion that it is as reasonable an inference as any proposed by the plaintiff, that the left front of the Chevrolet struck the truck while it was proceeding on its own side of the road and thereupon careened over the north half of Main street for a distance of about 190 feet.

It is next contended by plaintiff that the finding on the pavement north of the center line of Main street of a mark or groove 18 to 24 inches in length at about the place of the collision would indicate that the tractor or some part thereof was on the wrong side of the highway and that the jury should have been given an opportunity to consider the relative weight of the Chevrolet and the truck tractor so that it might determine as a matter of fact whether this mark or groove in the pavement was caused by the tractor or some part thereof. This contention is disposed of by reference to the statement of plaintiff's principal and only witness on this point, witness Pociask, who testified that this mark "was not made by the truck" and "brake marks of the truck were on his side of the road, showed where he had applied his brakes for 8 or 10 feet." From plaintiff's evidence it is clearly shown that the truck was traveling on its right side of the road and the inference could not be drawn from the evidence as we view it that the groove or mark found in the pavement was caused by the truck or any part thereof.



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as reasonable an inference as any proposed by the plaintiff, that  
the left front of the Chevrolet struck the truck while it was  
proceeding on its own side of the road and therefore occurred over  
the north half of Main Street for a distance of about 120 feet.  
It is next contended by plaintiff that the finding on the  
movement north of the center line of Main Street of a mark or groove  
is to 24 inches in length at about the place of the collision would  
indicate that the tractor or some part thereof was on the wrong  
side of the highway and that the jury should have been given an  
opportunity to consider the relative weight of the Chevrolet and  
the truck tractor so that it might determine as a matter of fact  
whether this mark or groove in the pavement was caused by the tractor  
or some part thereof. This contention is dismissed as by reference  
to the statement of plaintiff's principal and only witness on this  
point, witness Poolish, who testified that this mark was not made  
by the truck and "some marks of the truck were on his side of  
the road, showed where he had spilled his bucket for 3 or 10 feet."  
From plaintiff's evidence it is clearly shown that the truck was  
traveling on its right side of the road and the inference could  
not be drawn from the evidence as we view it that the groove or  
mark found in the pavement was caused by the truck or any part thereof.

The foregoing disposes of all the evidentiary factors relied upon by the plaintiff in contending that there was sufficient evidence of the defendants' negligence to constrain the trial court to deny defendants' motion for a directed verdict. It is our view that the evidence, with all reasonable inferences to be drawn therefrom in favor of plaintiff failed to prove any negligence on the part of the truck driver. We are of the opinion that the trial court was correct in directing a verdict in favor of the defendants.

For the reasons indicated, the judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.

*Circuit*

*File 1-16  
6-7-95*



The foregoing summary of all the evidentiary factors relied upon by the plaintiff is substantially that there was sufficient evidence of the defendant's negligence to sustain the trial court's verdict for a directed verdict. It is our view that the evidence, with all reasonable inferences to be drawn therefrom in favor of the plaintiff, failed to prove any negligence on the part of the truck driver. We are of the opinion that the trial court was correct in directing a verdict in favor of the defendant.

For the reasons indicated, the judgment of the Superior

Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

ROBERT E. L. AND KILLY, J. CONCUR.

BANKERS BUILDING, INC.,  
Appellee,  
  
v.  
  
HOWARD F. BISHOP,  
Appellant.

APPEAL FROM  
  
CIRCUIT COURT  
  
COOK COUNTY.

326 I.A. 256

MR. JUSTICE LUPE DELIVERED THE OPINION OF THE COURT.

On March 25, 1942, a judgment by confession was entered in favor of plaintiff and against defendant for the sum of \$14,814.66 and costs, which included the sum of \$784.03 allowed to plaintiff as attorney's fees. The judgment was based upon three separate leases for three successive terms, covering the leasing by plaintiff to defendant of the 37th floor of the Bankers Building in Chicago, Illinois. The defendant, by his original and supplemental verified petitions moved the court to vacate the judgment. Plaintiff acknowledged receipt of the sum of \$272.36 since the entry of the judgment and credit was given upon the judgment for this amount. Leave was given defendant to defend as to the sum of \$763.97 and execution was directed to issue for the net balance of \$13,778.33. Defendant appealed.

The complaint contained three counts, each count declaring upon a separate lease for the same space in the Bankers Building in Chicago. The lease first in point of time ran from May 1, 1937 to April 30, 1938; the second lease ran from May 1, 1938 to April 30, 1939; and the third lease commenced on May 1, 1939 and expired April 30, 1940. The complaint alleged that there was due on the first lease a balance of rent amounting to \$55.76, plus \$14.80 interest, and that there was due the sum of \$6000 on each of the second and third leases.



BANKERS BUILDING, INC.,

Appellee,

v.

HOWARD R. BISHOP,

Appellant.

CIRCUIT COURT

CIRCUIT COURT

CIRCUIT COURT

32614.258

The court entered the order of the court.

On March 22, 1942, a judgment by confession was entered

in favor of plaintiff and against defendant for the sum of

14,814.88 and costs, which included the sum of \$24.00 allowed

to plaintiff as attorney's fees. The judgment was based upon

three separate leases for three successive terms, covering the

leasing by plaintiff to defendant of the 37th floor of the Bankers

Building in Chicago, Illinois. The defendant, by his original and

supplemental verified petitions moved the court to vacate the

judgment. Plaintiff acknowledged receipt of the sum of \$27.25

since the entry of the judgment and credit was given upon the

judgment for this amount. Leave was given defendant to defend

to the sum of \$27.25 and execution was directed to issue for the

net balance of 14,787.63. Defendant appealed.

The complaint contained three counts, each count dealing

upon a separate lease for the same space in the Bankers Building in

Chicago. The lease first in point of time ran from May 1, 1937

to April 30, 1938; the second lease ran from May 1, 1938 to April

30, 1939; and the third lease commenced on May 1, 1939 and expired

April 30, 1940. The complaint alleged that there was due on the

first lease a balance of rent amounting to \$25.75, plus \$1.80

interest, and that there was due the sum of \$2000 on each of the

second and third leases.

The defendant claims that the three leases provide that all rentals (except certain sums) were to be paid in legal services; that defendant was ready, willing and able to perform legal services as requested by plaintiff, and, hence, there was no liability. Such contention on the part of defendant makes it necessary to construe the leases.

Paragraph 1 of the first lease provides that defendant is to pay plaintiff the sum of \$6000 "in coin or currency" in six installments of \$250 each, beginning November 1, 1937, the balance to be offset through the medium of legal services rendered by defendant for plaintiff "as per rider." The rider provides in substance:

(1) Payment of all rents due under lease dated September 27, 1937, covering the entire 37th floor of the Bankers Building is to be made as per paragraph 1 of the attached lease;

(1-a) That the lessee is to perform certain legal services for the lessor and it was agreed that when lessee is paid for said services he shall pay the same to the lessor until the term rental called for under the lease is paid in full;

(1-b) Lessee is to perform certain legal services for other corporations and that when he is paid for such services by said corporations he shall pay to the lessor such sums so received by him until the term rental is paid in full;

(2) Lessee agreed to furnish letters to the lessor assigning all fees mentioned in paragraph 1-b, naming all the corporations and the approximate amount of fees expected for legal services that are to be rendered;

(3) That any moneys paid to the lessee by lessor for legal services performed in accordance with this agreement shall be credited to the rent account of \$3,973.35 covering occupancy by the lessee of the 37th floor from May 1, 1935 to April 30, 1937 under lease dated May 10, 1935;



The defendant claims that the three leases provide that all rentals (except certain taxes) were to be paid in legal services; that defendant was ready, willing and able to perform legal services as requested by plaintiff, and, hence, there was no liability. Such contention on the part of defendant makes it necessary to construe the leases.

Paragraph 1 of the first lease provides that defendant is to pay plaintiff the sum of \$6000 "in coin or currency" in six installments of \$1000 each, beginning November 1, 1937, and balance to be offset through the medium of legal services rendered by defendant for plaintiff "as per rider." The rider provides in substance:

(1) Payment of all taxes the under lease dated September 27, 1937, covering the entire 37th floor of the Bankers Building is to be made as per paragraph 1 of the attached lease;

(1-a) That the lessee is to perform certain legal services for the lessor and it was agreed that when lessee is paid for said services he shall pay the sum to the lessor until the term rental called for under the lease is paid in full;

(1-b) Lessee is to perform certain legal services for other corporations and that when he is paid for such services by said corporations he shall pay to the lessor such sum as received by him until the term rental is paid in full;

(2) Lessee agreed to furnish letters to the lessor stating all fees mentioned in paragraph 1-a, noting all the corporations and the approximate amount of fees expected for legal services that are to be rendered;

(3) That any moneys paid to the lessor by lessor for legal services performed in accordance with this agreement shall be credited to the rent account of \$9,972.33 covering occupancy by the lessee of the 37th floor from May 1, 1935 to April 30, 1937 under lease dated May 10, 1935;

(3-a) When the aforementioned account has been paid in full any moneys paid to the lessee by lessor for legal services performed in accordance with this agreement shall be credited to the rent account of this lease in accordance with the terms of paragraph 1 of this lease, with the definite understanding and agreement that the lessee will continue to render legal services to the lessor until such time as said rent account has been paid in full by said legal services;

(4) It was agreed that all electric light and other miscellaneous bills that became due and payable shall be paid on the first day of each current month during the term of this lease.

In construing the leases defendant contends that the wording of the leases is ambiguous, permitting a resort to extrinsic evidence in order to determine the intent of the parties by conversations and correspondence between the parties and acts of the plaintiff showing its interpretation of the claimed ambiguous wording of the leases to be that all of the rental reserved in the three leases, except a portion thereof to be paid in cash, was to be paid by defendant solely and exclusively from legal services to be performed by defendant for plaintiff. We have examined the language which is in controversy, and we are of the opinion that this language in each of the three leases is not ambiguous, and that a proper construction of the leases can be made without resorting to extrinsic evidence.

The first lease provides that defendant is to pay plaintiff the sum of \$6000 "in coin or currency" in six installments of \$250 each, beginning November 1, 1937, the balance to be offset through the medium of legal services rendered by defendant for plaintiff as "per attached rider". The rider specified that the payment of all rents due under the lease was to be payment as specified on the attached lease, which language of the attached lease is given above; that defendant was to perform certain legal services for plaintiff and when plaintiff was paid for said services, defendant should pay



(3-a) When the aforementioned account has been paid in

all any money paid to the lessee by lessor for legal services  
performed in accordance with this agreement shall be credited to  
the rent account of this lease in accordance with the terms of  
paragraph 1 of this lease, with the definite understanding and  
agreement that the lessee will continue to render legal services  
to the lessor until such time as said rent account has been paid  
in full of said legal services;

(4) It was agreed that all electric light and other  
installations bills that become due and payable shall be paid on  
the first day of each current month during the term of this lease.

In construing the lease defendant contends that the wording  
of the lease is ambiguous, permitting a resort to extrinsic evidence  
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portion thereof to be paid in cash, was to be paid by defendant solely  
and exclusively for legal services to be performed by defendant for  
plaintiff. He has examined the language which is in controversy, and  
one of the opinions that this language in each of the three leases  
is not ambiguous, and that a proper construction of the lease can  
be made without resorting to extrinsic evidence.

The first lease provides that defendant is to pay plaintiff  
the sum of \$5000 "in coin or currency" in six installments of \$833  
each, beginning November 1, 1937, the balance to be offset through  
the medium of legal services rendered by defendant for plaintiff as  
per attached rider. The rider specified that the payment of all  
rents due under the lease was to be payment as specified on the  
attached lease, which language of the attached lease is given above;  
and defendant was to perform certain legal services for plaintiff  
and when plaintiff was paid for said services, defendant should pay

plaintiff all moneys received by him until the term rental called for under the lease was paid in full; that defendant was to perform legal services for other corporations and when defendant was paid for these services by said corporations that defendant should pay to the lessor all moneys received by him until the term rental was paid in full; that defendant was to furnish assignments of fees to be paid by said other corporations; and any moneys paid to defendant by lessor for legal services in accordance with the agreement should be credited to the rent account of defendant amounting to \$3973.35, which accrued and remained unpaid under lease dated May 10, 1935; that when said sum had been paid in full, any moneys paid to defendant by plaintiff for legal services performed, in accordance with the agreement, should be credited to the rent of the lease in accordance with Paragraph 1 of the lease, with the definite agreement that defendant would continue to render legal services to plaintiff until such time as said rental had been paid in full by said legal services.

We agree with the legal proposition announced in City of Chicago v. Weir, 165 Ill. 582, and Hungate v. New York Life Insurance Co., 267 Ill. App. 257, to the effect that the typewritten portion of an instrument prevails over the printed portion thereof, but we do not see how it is applicable here. The portion of the lease providing for the amount of the rental (\$6000) is not printed but is typewritten, so there can be no question that the rental was such sum. The lease provides that "the balance of the rent called for in this lease to be offset through the medium of legal services rendered by lessee for the lessor, as per attached rider." In our opinion the words "as per attached rider" control the language of the lease itself and that we must look to the language of the rider for our interpretation of the contract between the parties.

The provision in the rider that defendant was to perform certain legal services for plaintiff and that when defendant was paid for these services that the defendant would pay to plaintiff all



plaintiff all moneys received by him until the term rental called for under the lease was paid in full; that defendant was to perform legal services for other corporations and when defendant was paid for these services by said corporations then defendant should pay to the lessor all moneys received by him until the term rental was paid in full; that defendant was to furnish assignment of lease to be paid by said other corporations; and any moneys paid to defendant by lessor for legal services in accordance with the agreement should be credited to the rent account of defendant amounting to \$5275.00, which accrued and remained unpaid under lease dated May 10, 1933; that when said sum had been paid in full, any moneys paid to defendant by plaintiff for legal services performed, in accordance with the agreement, should be credited to the rent of the lease in accordance with paragraph 1 of the lease, with the definite agreement that defendant would continue to render legal services to plaintiff until such time as said rental had been paid in full by said legal services.

We agree with the legal proposition announced in City of Chicago v. City of New York, 126 Ill. 522, and Hunt v. City of Chicago, 287 Ill. 470, 227, to the effect that the typewritten portion of an instrument prevails over the printed portion thereof, but we do not see how it is applicable here. The portion of the lease providing for the amount of the rental (\$5000) is not printed but is typewritten, and there can be no question that the rental was such sum. The lease provides that "the balance of the rent called for in this lease to be offset through the medium of legal services rendered by lessor for the lessor, as per attached rider." In our opinion the words "as per attached rider" control the language of the lease itself and that must look to the language of the rider for our interpretation of the contract between the parties.

The provision in the rider that defendant was to perform certain legal services for plaintiff and that when defendant was paid for these services that the defendant would pay to plaintiff all

such moneys received by him on account of the rental until the rental reserved in the lease was paid in full, is identical in form with the provision in the rider in a separate paragraph thereof, that defendant was to perform legal services for other corporations. There is no provision in the lease or the rider that plaintiff agreed that the other corporations would hire and employ defendant to perform any particular legal services or for any particular amount. It cannot be said that if the "other corporations" had failed to submit legal work to defendant for his performance of the same, that plaintiff would be liable as and for a breach of contract. And the paragraph with reference to the performance by defendant of legal services for plaintiff cannot be construed to mean that if plaintiff had failed to furnish defendant with legal work defendant would have been relieved from his obligation to pay rent, nor could plaintiff be held liable as and for a breach of contract in the event it did not tender work to plaintiff for his performance. Also the language of the rider that "lessee is to perform certain legal services for the lessor"; "lessee is to perform certain legal services for other corporations"; and "with the definite understanding and agreement that the lessee will continue to render legal services to the lessor until such time as said rental account had been paid in full by said legal services"; taken in connection with the fact that there was no positive agreement by plaintiff to furnish legal work to defendant to be performed by him, means that the agreement of defendant to perform legal services for plaintiff and other corporations is an additional security to plaintiff as a means of collecting the rental to be due under the terms of the lease. At the time of making the lease, the defendant (according to the terms of the rider) was already indebted for past-due rent on a previous lease in the sum of \$3973.35, which amount defendant duly acknowledged and agreed to pay,



such money received by him on account of the rental until the rental reserved in the lease was paid in full, is identical in form with the provision in the rider in a separate paragraph thereof, that defendant was to perform legal services for other corporations. There is no provision in the lease or the rider that plaintiff agreed that the other corporations would nine and employ defendant to perform any particular legal services or for any particular amount. It cannot be said that if the "other corporations" had failed to submit legal work to defendant for his performance of the same, that plaintiff would be liable as and for a breach of contract. And the paragraph with reference to the performance by defendant of legal services for plaintiff cannot be construed to mean that if plaintiff had failed to furnish defendant with legal work defendant would have been relieved from his obligation to pay rent, nor could plaintiff be held liable as and for a breach of contract in the event it did not tender work to plaintiff for his performance. Also the language of the rider that "lessee is to perform certain legal services for the lessor"; "lessee is to perform certain legal services for other corporations"; and "with the lessee's understanding and agreement that the lessee will continue to render legal services to the lessor until such time as said rental account has been paid in full by said legal services"; taken in connection with the fact that there was no positive agreement by plaintiff to furnish legal work to defendant to be performed by him, means that the agreement of defendant to perform legal services for plaintiff and other corporations is an additional security to plaintiff as a means of collecting the rental to be due under the terms of the lease. At the time of making the lease, the defendant (according to the terms of the rider) was already indebted for past-due rent on a previous lease in the sum of \$393.55, which amount defendant duly acknowledged and agreed to pay,

and the defendant would presently be indebted in the further sum of \$6000 as and for the rental for the ensuing year. Under these conditions the parties agreed that defendant should pay the past-due rental and the current rental and that plaintiff, in addition, had the legal right to tender certain legal work to be performed by defendant, and that any payments made for such legal services were to be repaid by defendant to plaintiff to apply on the past-due and current rental.

The fact that neither the lease nor the rider contained any covenant or agreement on the part of plaintiff to furnish defendant with legal work; that the agreement of defendant to perform legal services is in effect an additional security or method by which plaintiff can receive payment of its rental in the event that defendant failed to pay same in cash; that the agreement of defendant to perform such services tendered to him by plaintiff is in similar form to the defendant's agreement to perform legal services for other corporations; leads us to conclude that the proper construction of the rider in connection with Paragraph 1 of the lease is that the obligation of defendant to pay the term rental of \$6000 is absolute, with the privilege accorded to plaintiff of employing defendant's legal services and offsetting the amount charged for such legal services against any unpaid rental not paid in cash by defendant.

The second lease provides for the payment of \$6000 in coin or currency "as per attached rider." There were two riders attached, the second of which is identical in wording with the rider attached to the first lease; the only difference is between the stated term of the lease and the amount of past-due rental, which included the balance due on the first lease.

The third lease and the rider attached thereto is identical in wording with the rider attached to the first lease and the second rider attached to the second lease. Our construction



and the defendant would presently be indebted in the further sum of \$6000 as and for the rental for the ensuing year. Under these conditions the parties agreed that defendant should pay the past-due rental and the current rental and that plaintiff, in addition, had the legal right to tender certain legal work to be performed by defendant, and that any payments made for such legal services were to be received by defendant to plaintiff to apply on the past-due and current rental.

The fact that neither the lease nor the rider contained any covenant or agreement on the part of plaintiff to furnish defendant with legal work; that the agreement of defendant to perform legal services is in effect an additional security or method by which plaintiff can receive payment of its rental in the event that defendant failed to pay same in cash; that the agreement of defendant to perform such services tendered to him by plaintiff is in similar form to the defendant's agreement to perform legal services for other corporations; leads us to conclude that the proper construction of the rider in connection with paragraph 1 of the lease is that the obligation of defendant to pay the term rental of \$6000 is absolute, with the privilege accorded to plaintiff of employing defendant's legal services and offsetting the amount charged for such legal services against any unpaid rental not said in cash by defendant.

The second lease provides for the payment of \$6000 in coin or currency "as per attached rider." There were two riders attached, the second of which is identical in wording with the rider attached to the first lease; the only difference is between the stated form of the lease and the amount of past-due rental, which included the balance due on the first lease.

The third lease and the rider attached thereto is identical in wording with the rider attached to the first lease and the second rider attached to the second lease. Our construction

of these riders is the same as our construction of the rider attached to the first lease.

The second lease contains an additional rider which provides in substance for certain interim payments in cash to be made by the lessee, depending upon the amount of sub-rents to be received by lessee for certain offices enumerated, in the space rented by said lessee, and it further provides that as long as certain offices in said space were not sublet, lessee will not be obligated to pay \$250 per month in cash but that said amount will be paid in legal services only. It is urged by defendant that this provision of the rider is sufficient to compel the construction that the amount specified for the term rent was to be paid in legal services (except so much as was therein provided to be paid in cash). With this contention we cannot agree.

There can be little doubt that under the terms of this rider if no sub-rents were received by the lessee the entire \$6000 was to be paid in unspecified instalments and at unspecified times up to the end of the lease out of fees for legal services received by lessee from the lessor and other corporations, and, in the event that no fees were received by defendant, there still remained the primary covenant of the lease to pay the \$6000 in coin or currency. Had it been the intention of the parties that the lessee was to pay the term rental in legal services except so much thereof to be paid in cash, there would have been an affirmative covenant by lessor to employ lessee or it would have obligated lessor to obtain lessee employment by other corporations where fees could have been earned by lessee to pay the amount of rental specified in said lease. We further find the acknowledgment in the third lease of the amount due and unpaid under the terms of the second lease, which amounted to \$8,473.35, and if it had been intended that the amount due under the second lease was to be paid solely in services, surely the defendant would not have acknowledged in the third lease that he was indebted to



of these riders is the same as the construction of the rider

attached to the first lease.

The second lease contains an additional rider which provides

in substance for certain interim payments in cash to be made by

the lessee, depending upon the amount of sub-rents to be received

by lessee for certain office services enumerated, in the case rented by

said lessee, and it further provides that as long as certain offices

in said space were not sublet, lessee will not be obligated to pay

\$250 per month in cash but that said amount will be paid in legal

services only. It is urged by defendant that this provision of the

rider is sufficient to compel the construction that the amount

specified for the term rent was to be paid in legal services (except

as much as was therein provided to be paid in cash). With this

contention we cannot agree.

There can be little doubt that under the terms of this rider

if no sub-rents were received by the lessee the entire \$8000 was to

be paid in unspecified installments and at unspecified times up to the

end of the lease out of fees for legal services received by lessee

from the lessor and other corporations, and, in the event that no

fees were received by defendant, there still remained the primary

covenant of the lease to pay the \$8000 in cash or currency. Had it

been the intention of the parties that the lessee was to pay the term

rental in legal services except as much thereof to be paid in cash,

there would have been an affirmative covenant by lessee to employ

lessee or it would have obligated lessee to obtain lessee employment

by other corporations where fees could have been earned by lessee to

pay the amount of rental specified in said lease. We further find

the acknowledgment in the first lease of the amount due and unpaid

under the terms of the second lease, which amounted to \$5,473.25,

and if it had been intended that the amount due under the second

lease was to be paid solely in services, surely the defendant would

not have acknowledged in the third lease that he was indebted to

plaintiff for said sum which remained due and unpaid under the second lease.

As to the three leases, the term rental was fixed at \$6000. In addition thereto defendant agreed to pay the balance due on former leases after allowing all credits, and in each instance, defendant agreed he was not to have the right to offset fees against new rent "until the aforementioned account had been paid in full." If the defendant was to pay the rent only if and when earned by legal services rendered, as contended by defendant, there would have been no primary covenant to pay the entire rent in coin or currency, nor would there have been permission given to defendant to offset the rent by fees to be received for legal services, and the leases would have provided for the discharge of the rent by the performance of legal services. By the use of the word "offset" it is indicated that there was an existing liability on the part of defendant, and not a conditional one which was dependent upon any future employment of defendant by plaintiff or other corporations.

We are of the opinion that the amount of the term rental as specified in Paragraph 1 of each of said leases was to be paid in cash, with the privilege to defendant of offsetting fees for services rendered by him to plaintiff and certain other corporations.

It is contended by plaintiff that the petition and supplemental petition filed to vacate the judgment by confession do not comply with Rules 15 and 26 of the Supreme Court and Rule 47 of the Circuit Court of Cook County. Rules 15 and 26 of the Supreme Court and Rule 47 of the Circuit Court, when read together, require that the affidavit in support of a motion to vacate a judgment by confession must be made on the personal knowledge of the affiant and must set forth with particularity the facts upon which the defense is based, and shall not



plaintiff for said sum which remained due and unpaid under the second

lease.

As to the three leases, the term rental was fixed at \$2000.

In addition thereto defendant agreed to pay the balance due on

former leases after allowing all credits, and in each instance,

defendant agreed as was not to have the right to offset fees against

new rent "until the aforementioned account had been paid in full."

If the defendant was to pay the rent only if and when earned by legal

services rendered, as contended by defendant, there would have been

no primary covenant to pay the entire rent in coin or currency, nor

would there have been permission given to defendant to offset the

rent by fees to be received for legal services, and the leases would

have provided for the discharge of the rent by the performance of

legal services. By the use of the word "offset" it is indicated

that there was an existing liability on the part of defendant, and not

a conditional one which was dependent upon any future employment of

defendant by plaintiff or other corporations.

We are of the opinion that the amount of the term rental

as specified in paragraph 1 of each of said leases was to be paid

in cash, with the privilege to defendant of offsetting fees for services

rendered by him to plaintiff and certain other corporations.

It is contended by plaintiff that the petition and supplemental

petition filed to vacate the judgment by confession do not comply with

Rules 15 and 26 of the Supreme Court and Rule 47 of the Circuit Court

of Cook County. Rules 15 and 26 of the Supreme Court and Rule 47 of

the Circuit Court, when read together, require that the affidavit

in support of a motion to vacate a judgment by confession must be made

on the personal knowledge of the affiant and must set forth with

certainty the facts upon which the defense is based, and shall not

consist of conclusions, but of such facts as would be admissible in evidence, and it must affirmatively appear from the affidavit that if the affiant were sworn as a witness he could testify competently thereto. In Paragraphs 18 of the petition and 6 of the supplemental petition, defendant alleged, "Upon information and belief \* \* \* that after May 1, 1940, a separate account was opened on the books of the plaintiff and maintained by it for the purpose of distinguishing said account, which was to be paid in cash from the former account which was to be paid and offset in services". This allegation being based upon information and belief does not meet the requirement of Rule 15 of the Supreme Court. It clearly shows that the affiant lacked personal knowledge and he could not competently testify to the alleged facts stated therein. Paragraph 16 of the original petition alleges that on June 14, 1935, January 14, 1936, March 30, 1941 and June 6, 1941, various conversations took place between the defendant and the officers and agents of plaintiff, wherein the "officers agreed that the balance of the rental provided for in said respective leases was not to be paid in cash but that plaintiff would employ the defendant to perform legal services in payment of said rental". The alleged conferences and discussions of June 14, 1935 and January 14, 1936, were had long prior to the execution of the first lease and the conferences under date March 30, 1941 and June 6, 1941, occurred after the expiration of the third lease. These conferences and discussions would not be admissible to prove the meaning and intent of the language used in any of the three leases. Any testimony regarding these discussions would merely amount to an attempt to vary the terms of the leases by parol. Affidavits to vacate a judgment by confession, which purport to set forth agreements not contained in the lease, are insufficient. (Stead v. Craine, 256 Ill. App. 445, 451.) We further find that this paragraph is based upon



...of conclusions, but of such facts as would be admissible in evidence, and it must affirmatively appear from the affidavit that the affiant was sworn as a witness he could testify competently hereto. In paragraph 15 of the petition and 3 of the supplemental petition, defendant alleged, "Upon information and belief that after May 1, 1940, a separate account was opened on the books of the plaintiff and maintained by it for the purpose of distributing said account, which was to be paid in cash from the former account which was to be paid and offset in services". This allegation being based upon information and belief does not meet the requirement of rule 15 of the Supreme Court. It clearly shows that the affiant lacked personal knowledge and he could not competently testify to the alleged facts stated therein. Paragraph 16 of the original petition alleges that on June 14, 1935, January 14, 1936, March 30, 1941 and June 6, 1941, various conversations took place between the defendant and the affiant and agents of plaintiff, wherein the officers agreed that the balance of the rental provided for in said respective leases was not to be paid in cash but that plaintiff could employ the defendant to perform legal services in payment of said rental. The alleged conferences and discussions of June 14, 1935 and January 14, 1936, were had long prior to the execution of the first lease and the conferences under date March 30, 1941 and June 6, 1941, occurred after the expiration of the third lease. These conferences and discussions would not be admissible to prove the meaning and intent of the language used in any of the three leases. Any testimony regarding these discussions would merely amount to an attempt to vary the terms of the leases by parol. Affidavits to vacate a judgment by confession, which purport to set forth agreements not contained in the lease, are inadmissible. (Stead v. Geline, 235 Ill. App. 445, 451.) We further find that this paragraph is based upon

the conclusion of the defendant, wherein he says, "that in said discussion said officers agreed that the balance of the rental," etc. The rule is well settled that an affidavit supporting a motion to vacate a judgment by confession should allege facts and not mere conclusions (Wasem v. Metropolitan Life Ins. Co., 269 Ill. App. 275; Davis v. Mosbacher, 252 Ill. App. 536.) Other paragraphs of the petition and supplemental petition, as grounds to vacate the judgment, allege cross-statements and counter-claims. It is the well settled rule that judgment by confession will not be opened to permit a defendant to file a counter-claim or cross-statement. (Busse v. Muller, 295 Ill. App. 101; Stead v. Craine, 256 Ill. App. 445; Koehler v. Glaum, 169 Ill. App. 537.) If the defendant has a claim or claims against the plaintiff he has his remedy. He may institute proceedings for the purpose of enforcing the same, and, if they are well founded the courts will grant him redress. Defendant complains that plaintiff filed a counter-affidavit which went to the merits of his defense, and that the court failed to strike said counter-affidavit. From a reading of the order entered at the time of the hearing of defendant's motion to vacate the judgment, it is plain to be seen that the court did not consider the counter-affidavit in ruling upon said motion. The order entered by the trial judge expressly provides in Paragraph 1 thereof, that he gave no effect to the counter-affidavit of plaintiff. It is the rule that counter-affidavits interposed in connection with motions to open judgments by confession should not be considered on questions of fact raised as to the merits of the case. (Stranak v. Tomasovic, 309 Ill. App. 177.) The same rule now prevails under the provision of the Practice Act and Rule 15 of the Supreme Court. (Walrus Mfg. Co. v. Wilcox, 303 Ill. App. 286.)

It is contended that no date is fixed when the rent was payable in the leases with certain exceptions and therefore the



the conclusion of the defendant, "that in this  
 situation said officers agreed that the balance of the rental,"  
 etc. The rule is well settled that an affidavit supporting a motion  
 to vacate a judgment by confession should allege facts and not  
 mere conclusions (Green v. Metropolitan Life Ins. Co., 208 Ill. App.  
 275; Davis v. Koenig, 208 Ill. App. 536.) Other paragraphs of  
 the petition and supplemental petition, as regards to vacate the  
 judgment, allege cross-statements and counter-claims. It is the  
 well settled rule that judgment by confession will not be opened  
 to permit a defendant to file a counter-claim or cross-statement.  
 (Wase v. Miller, 208 Ill. App. 101; Stow v. Graine, 208 Ill. App.  
 413; Koenig v. Green, 208 Ill. App. 537.) If the defendant has  
 a claim or claims against the plaintiff he has his remedy. He may  
 institute proceedings for the purpose of enforcing the same, and  
 if they are well founded the court will grant his request. Defendant  
 complains that plaintiff filed a counter-affidavit which went to  
 the merits of his defense, and that the court failed to strike  
 said counter-affidavit. From a reading of the order entered at the  
 time of the hearing of defendant's motion to vacate the judgment,  
 it is plain to be seen that the court did not consider the counter-  
 affidavit in ruling upon said motion. The order entered by the  
 trial judge expressly provides in Paragraph 1 thereof, that he gave  
 no effect to the counter-affidavit of plaintiff. It is the rule  
 that counter-affidavits introduced in connection with motions to  
 open judgments by confession should not be considered on questions  
 of fact raised as to the merits of the case. (Stranah v. Lomessvick,  
 208 Ill. App. 177.) The same rule now prevails under the provision  
 of the Practice Act and Rule 16 of the Supreme Court. (Wirtz v. ...  
Co. v. ..., 208 Ill. App. 236.)  
 It is contended that no date is fixed when the rent was  
 payable in the lease with certain exceptions and therefore the

plaintiff was not entitled to confess judgment under the lease. This would not prevent the plaintiff from confessing judgment under the power given it by the terms of the lease. True the leases did not, with certain exceptions, specify when the rental was to be paid during each of their respective terms. However, the law is well settled that when the amount of the annual rental is fixed in a lease but no dates are specified for their payment, no custom or usage to the contrary being shown, the same were payable at the end of the year. (Barnard v. Triangle Music Co., 1 Wash. (2d) 41.) Plaintiff is entitled to interest from the last day of the term of each of said leases, as provided for in the first paragraph of said leases.

We have considered the many other contentions of defendant and have examined the authorities submitted in support thereof, but, considering the view we take in this case, we deem it unnecessary to discuss them.

After a careful examination of the petition and supplemental petition, we feel that the court was correct in his ruling denying leave to open the judgment excepting as to the sum of \$763.97. A motion to vacate a judgment entered by confession is addressed to the sound legal discretion of the trial court and his action in denying it will not be reviewed unless it appears that such discretion has been abused. (Koehler v. Glaum, 169 Ill. App. 537; Blake v. State Bank of Freeport, 178 Ill. 182.)

During oral argument, plaintiff's attorney stated that since the appeal was perfected, defendant became entitled to a credit of \$620.70. Therefore the judgment of the Circuit Court is modified by reduction to \$13,157.63, thereby giving effect to the credit which defendant is admittedly entitled to; and, as modified, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.



plaintiff was not entitled to contract judgment under the lease. This would not prevent the plaintiff from contracting judgment under the power given it by the terms of the lease. For the lease did not, with certain exceptions, specify when the rental was to be paid during each of their respective terms. However, the law is well settled that when the amount of the annual rental is fixed in a lease but no date was specified for their payment, no custom or usage to the contrary being shown, the same were payable at the end of the year.

(Barnard v. Triennial Mfg. Co., 1 Wash. (2d) 41.) Plaintiff is entitled to interest from the last day of the term of each of said leases, as provided for in the first paragraph of said leases. We have considered the many other contentions of defendant and have examined the authorities submitted in support thereof, but, considering the view we take in this case, we deem it unnecessary to discuss them.

After a careful examination of the petition and supplemental petition, we feel that the court was correct in his ruling having leave to open the judgment exceeding as to the sum of \$23,97. A motion to vacate a judgment entered by confession is addressed to the court and not to the trial court and his action in denying it will not be reviewed unless it appears that such objection has been abused. (Kochler v. Gump, 120 Ill. App. 537; Blake v.

State Bank of Freeport, 178 Ill. 152.)

During oral argument, plaintiff's attorney stated that since the appeal was perfected, defendant became entitled to a credit of \$20.70. Therefore the judgment of the Circuit Court is modified by reduction to \$1,157.65, thereby giving effect to the credit which defendant is admittedly entitled to; and, as modified, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

EDWARD J. LEE, J. CLERK.

42732

EMIL DENEMARK and JENNIE DENEMARK,  
Appellants,  
vs.  
ARLINGTON PARK JOCKEY CLUB, INC.,  
Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

326 I.A. 256<sup>2</sup>

MR. JUSTICE LUPE DELIVERED THE OPINION OF THE COURT.

This is an action brought by plaintiffs against defendant to recover damages sustained by plaintiffs on account of injuries to a race horse named War Minstrel belonging to plaintiffs, the injuries being caused by the alleged negligence of defendant while the horse was running a race on the race track of defendant.

Upon motion of the defendant the amended complaint was stricken for failure to state a cause of action and, plaintiffs electing to stand upon said amended complaint, the court dismissed plaintiffs' suit at plaintiffs' costs and entered judgment thereon. This appeal of plaintiffs is to reverse that judgment.

Plaintiffs' amended complaint alleges that on July 9, 1941, they owned and operated a thoroughbred horse racing stable and among the horses owned by them was a seven year old gelding named War Minstrel, and that this horse was known throughout the racing world as a sterling handicap racer and had won in purses in excess of \$65,000, and was then of the cash value of \$25,000. That on the 30th day of June, 1941, pursuant to nomination made by plaintiffs and the payment by plaintiffs to defendant of a nominating fee and entry fee of \$50, War Minstrel was entered by plaintiffs at the request of defendant in a race known as the



STATE OF NEW YORK

IN SENATE

1891

REPORT OF THE

COMMISSIONER

OF THE LAND OFFICE

FOR THE YEAR 1890

ALBANY: J.B. KNEELAND, 1891

The Commission has the honor to acknowledge the receipt of the report of the Surveyor General, dated the 1st of January, 1891, and to express its appreciation of the care and skill which have been exercised in the preparation of the same. The report contains a full and complete statement of the condition of the land office at the close of the year 1890, and of the progress of the various branches of the office during the year. It also contains a full and complete statement of the condition of the land office at the close of the year 1889, and of the progress of the various branches of the office during the year. The report is a valuable and interesting one, and it is hoped that it will be of service to the public.

Upon review of the report, the Commission has the honor to express its appreciation of the care and skill which have been exercised in the preparation of the same. The report contains a full and complete statement of the condition of the land office at the close of the year 1890, and of the progress of the various branches of the office during the year. It also contains a full and complete statement of the condition of the land office at the close of the year 1889, and of the progress of the various branches of the office during the year. The report is a valuable and interesting one, and it is hoped that it will be of service to the public.

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Grassland Handicap which was being run on defendant's track on the 9th day of July, 1941; that defendant was engaged in maintaining and operating and conducting a thoroughbred horseracing meeting, and that it owned, maintained and operated and controlled a racetrack and race grounds as part of which were a dirt track and a grass or turf track, and that the same was located at or near the Village of Arlington Heights in Cook County, Illinois; that under the terms and conditions imposed by defendant and accepted by plaintiffs the race was required to be run on the turf or grass course, said course being within the infield of the regular track on the race grounds; that at said time and place War Minstrel was competing for a prize or purse offered by defendant to the owners of horses entered and competing in the race; that War Minstrel was in a fit and sound condition and was ridden by a jockey who was thoroughly competent and skilled in the riding, guiding and management of racehorses and who at all times herein mentioned was in the exercise of due care for the safety of said horse and skilfully used due care in riding and managing the horse; that during the running of the race War Minstrel, without any negligence on the part of plaintiffs or their agents or servants, was forced off of the turf course and into and through the hedge then and there skirting said course, unseating his rider, and that War Minstrel then and there became loose and free, and while riderless ran after the field of horses which were running said race, without guidance and control of a jockey, and that War Minstrel then ran into and was caught and tripped on a fence consisting of stout woven wire which reached across the infield from the inner edge of the turf track on its northerly side in a southwesterly direction to the inner edge of the turf track on its southerly side and was about 600 feet long; and that the same was not a regular fence necessary or proper to the maintenance and operation of





defendant's racetrack; that said fence had been a temporary obstruction and was erected by defendant on July 3, 1941, for the sole purpose of providing space and room for an overflow of patrons attending the races of defendant on July 4, 1941, and that said obstruction was not necessary to be maintained by defendant, and that it had never been before maintained by defendant when a turf race was run on the grass or turf course; that defendant by and through its agents, servants and employees, negligently and carelessly erected and placed said fence at the place aforesaid, and that it failed to remove the same and that it carelessly, negligently and improperly suffered and permitted the same to remain for more than five days after July 4, 1941, up to and including July 9, 1941.

Plaintiffs further alleged that the wire fence so placed and maintained by defendant made the racetrack dangerous and unsafe to any horse running in the race on the grass course or turf course and that any horse running a race on said grass or turf course was likely to run into and against and be injured by the wire fence, all of which was known to the defendant or by the exercise of due care would have been known to it.

Plaintiffs further allege that there was no fence on the inner side of the turf or grass course between the course and the infield sufficient to prevent or restrain a horse running on the turf or grass course from leaving the same and entering into the infield where the wire fence was placed, and that horses running races on a turf or grass course were likely to bolt from and leave the track and go into the infield; that the Grassland Handicap was required by defendant to be run by the owners of the horses upon the turf or grass course of defendant and that each horse which ran in the race was under the direction and management of defendant; that there were ten horses entered in the race and that each one was under the direction of defendant,





its agents or servants; that the grass or turf course on its inside or infield had no barrier or fence to prevent horses running upon the grass or turf course from leaving the same and entering into the infield where the wire fence had been placed by defendant; that there was a hedge or shrubbery growing upon the inside of said turf or grass course which was about two feet in height, and that the same was naturally ineffectual to prevent horses running on the turf or grass course from leaving the same and entering the infield.

Plaintiffs further allege that it is a well known propensity, tendency or inclination of race horses to bolt from the track where there is no fence or other barrier sufficient to restrain them, and that such propensity, tendency or inclination of race horses was well known to defendant or the same would have been known to it had it exercised due care in that behalf; that because of the likelihood of said horses to bolt at the time and place aforesaid, it became the duty of defendant to have a fence or other barrier on the inside of the grass or turf track to prevent said horses from bolting or leaving the track, and that it was the duty of defendant not to allow any obstruction or barrier in the infield that would be dangerous to the horse or horses bolting from or leaving the turf or grass course; that not regarding its duty, the defendant negligently and carelessly and wrongfully allowed and directed the ten horses to run the race upon the track while there was no sufficient barrier or fence to keep War Minstrel from leaving or bolting from the track; and that defendant wrongfully and carelessly allowed and permitted the wire fence to remain on the infield from the 4th day of July to and including the 9th day of July, 1941; and that by reason of the negligence of defendant War Minstrel ran into and became entangled in the wire fence.



its estate or property; that the fence on both sides of  
its estate or property is sufficient to prevent  
horses running from the estate or property into  
the road and adjoining lands and fields where the wire fence has  
been placed or erected; that there was a notice or warning  
given to the public at said point of fence corner where the  
about one foot in width, and that the same was actually in-  
sufficient to prevent horses running on the road or fence corner  
from leaving the road and adjoining lands and fields.  
The plaintiff further alleges that it is a well known  
proposition, founded on the principles of natural justice and equity, that  
the party who erects a fence or other barrier sufficient  
to restrain them, and thus secure themselves, themselves or their  
land or other property, and who is well known to be the owner of the  
land, has a duty to it and it is incumbent on him to keep it in  
that respect at the highest of said duty is to keep it in the  
and also, if possible, to secure the duty of defendant to have a  
fence or other barrier on the inside of the fence on that side  
to prevent said horses from running on leaving the road, and  
that it was the duty of defendant not to allow any obstruction  
or barrier in the field that would be dangerous to the horse or  
horses passing from or leaving the road or fence corner; that  
not regarding its duty, the defendant negligently and carelessly  
and intentionally allowed and directed the two horses to run the  
road upon the track while there was no sufficient barrier or fence  
to keep the horses from leaving or running from the track;  
and that defendant negligently and carelessly allowed and permitted  
the wire fence to remain on the inside from the 1st day of July  
to and including the 30th day of July, 1901; and that in reason  
of the negligence of defendant the horses ran into and became  
entangled in the wire fence.

Plaintiffs further allege that eight of the ten horses running in the Grassland Handicap were owned by persons other than the plaintiffs; that plaintiffs owned two of said horses in said race, one of which was War Minstrel; that plaintiffs had no control over the other eight horses and that while the race was being run the plaintiffs and their jockeys were in the exercise of due care for the safety of War Minstrel; that a rider of one of the other horses running in the race ran against and forced War Minstrel from the turf or grass track into the infield, which caused the rider of War Minstrel to become unseated and thrown from the horse and that War Minstrel, being riderless, ran into and against and attempted to jump over the wire fence which had been placed in the infield by defendant, and that from the injuries received it became necessary to kill the horse.

In paragraph 14 of the complaint, plaintiffs charged defendant with wilful, wanton and reckless conduct in placing and afterwards maintaining the wire fence in the infield while War Minstrel was running in the race upon the grass or turf course; and that by so doing the defendant exhibited disregard for safety of the property of plaintiffs and exhibited a conscious indifference to the probable consequences of its act. Damages are claimed in the sum of \$75,000.

The plaintiffs allege that while plaintiffs and their agents and servants were in the exercise of due care for the safety of their horse War Minstrel the horse was seriously injured through negligence of the defendant, and that the horse had to be killed. Plaintiffs claim that defendant was negligent in placing the woven wire fence across the infield of the track upon which the race in which War Minstrel was to run, for the purpose of making more room for an expected crowd of people at the track on July 4, 1941, and in leaving the wire fence there for five days





after its purpose was served. They further claim that defendant was negligent in permitting the running of the race in which War Minstrel was injured, upon the turf course without a fence or other barrier to prevent horses from leaving the turf track and running into the infield and then running into the fence which defendant placed and left on the infield of the track.

Defendant contends that the hedge bordering the turf course and the woven wire fence stretched across the infield were mere passive agencies which furnished a condition making the injury of War Minstrel possible, and that this condition was not the proximate cause of the injury to the horse; that the prime cause of said injury was the act of a rider of another horse in the race in forcing plaintiffs' horse off of the turf course.

It was the duty of the defendant to keep the turf course free from obstruction so that the horses running upon it would have an opportunity to proceed thereon without any danger except that incidental to the usual running of a horserace. That duty did not extend beyond the turf course and other parts of the grounds provided by defendant in connection with a track upon which horses were run. Horses were not expected to run loose in the infield and no provision was made that a horse should be running in the infield. We can see no duty upon the defendant other than to keep its track and other parts of its grounds which horses were expected to use, in a reasonably safe condition so that the horses, which might be upon the track or some other part of the grounds which horses were expected to use, might be protected from injury.

If we assume that the maintenance of a two-foot shrubbery hedge, instead of a barrier which would prevent a horse engaged in running a race from getting into the infield, was negligence, or, if we assume that the maintenance of the





temporary wire fence was negligence on the part of defendant, we must find that the construction and maintenance of the hedge and the wire fence in the infield only furnished conditions which made the injury possible, and were not the proximate cause of the injury to plaintiffs' horse. The immediate cause of the accident was the force or impetus given to War Minstrel by another horse in the race. This forced War Minstrel off of the turf course, through the hedge, and unseated his rider. If War Minstrel had not been forced off of the turf by another horse the accident would not have happened. If War Minstrel had not unseated his driver he would have remained under control so that the accident could have been averted. It was only by the immediate act of War Minstrel being forced off of the track, with the result that his driver was unseated, that the accident became at all possible. Even then, if War Minstrel had not attempted to run around in the infield the accident would not have happened.

In the case of Briske v. Village of Burnham, 379 Ill. 193, the plaintiff was a guest in an automobile of one Jakubcyk. The driver of the automobile drove it down a street that had been closed to the public traffic and ran into a barricade. The plaintiff contended that the Village was negligent in vacating the street and then leaving it, apparently a public thoroughfare, in a dangerous condition for travelers, without sufficient notice or warning at the point of vacation, that the street beyond was closed and dangerous and that, in the absence of such notice, the Village remained liable for defects in the street. The court held that the proximate cause of the injury was the negligence of the driver of the automobile, and that the presence of the barricade was a condition and not a proximate cause. At page 199, the court said:



[illegible]

"If a negligent act or omission does nothing more than furnish a condition making an injury possible, and such condition, by the subsequent independent act of a third person, causes an injury, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury (*Storen v. City of Chicago*, 373 Ill. 530; *Illinois Central Railroad Co. v. Oswald*, 338 Ill. 270; *Hartnett v. Boston Store of Chicago*, 265 Ill. 331; *Seith v. Commonwealth Electric Co.*, 241 Ill. 252.) An intervening efficient cause is a new and independent force which breaks the causal connection between the original wrong and the injury and itself becomes a direct and immediate cause of the injury. (*Illinois Central Railroad Co. v. Oswald*, supra; *Seith v. Commonwealth Electric Co.*, supra.) The cause of an injury is that which actually produces it, while the occasion is that which provides an opportunity for the causal agencies to act. (*Illinois Central Railroad Co. v. Oswald*, supra; *Phillabaum v. Lake Erie and Western Railroad Co.*, 315 Ill. 131.) Manifestly, neither the fact that the vacated street was open to public travel nor the existence of the barricade did anything more than furnish a condition, and if either constituted negligence on the part of the respective defendants they were not acts concurrent with the negligence of Jakubcyk, the driver of the automobile in which plaintiff was a guest. In short, the intervening efficient cause of plaintiff's injuries was Jakubcyk's negligence."

In the case of *Storen v. City of Chicago*, 373 Ill. 530, the defendant was charged with negligence in failing to maintain a curbing between the street and a sidewalk, which negligence was the proximate cause of the injury to plaintiff, caused by a car parked along the street being struck by a moving automobile, and the parked car being driven by this force into the sidewalk and pinning plaintiff against a hydrant. In holding that the negligence of the driver of the car was the proximate cause of the injury and the lack of curbing was a passive condition which made the injury possible, the court said, at page 533:

"The issue presented for decision is whether the construction and maintenance by the defendant of the opening in the curb for use as a driveway constituted negligence, and, if so, whether such negligence was a contributing cause of plaintiff's injuries. Admittedly, the negligence of the person driving the automobile which struck *Filmanowicz*'s parked car was the immediate cause of plaintiff's injuries. The question remains, did defendant's negligence, if any, also render it accountable to plaintiff. In short, was the condition of the curb, in legal contemplation, a direct contributing cause of the injuries suffered by the plaintiff. Where two or more persons, under circumstances creating primary accountability, directly produce a single, indivisible injury by their concurrent negligence, they are jointly and severally liable, even though there is no common duty, common design or concerted action. (1 *Cooley on Torts* (4th ed.) p. 276ff, sec. 86; 62 *Corpus Juris*, (Torts,) sec. 45.) If,



[illegible]

1. The Board of Directors of the Corporation is authorized to issue bonds in the amount of \$1,000,000, in whole or in part, and to create a sinking fund for the redemption of such bonds.

however, a negligent act or omission does nothing more than furnish a condition making an injury possible, and such condition, by the subsequent act of a third person, causes an injury, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury. (*Seith v. Commonwealth Electric Co.* 241 Ill. 252.) Obviously, the depression in the curb in the present case did nothing more than furnish a condition and, if it constituted negligence on the part of defendant, was not an act concurrent with the negligence of the driver of the automobile which struck the parked car. The action of the driver, moreover, was not such as in the exercise of reasonable diligence the defendant would have anticipated, nor was the driver under the defendant's control."

It must be conceded that the wire fence was placed in the infield by the defendant and that the wire fence contributed to the injury to plaintiffs' horse, but we are satisfied that this particular condition was not a negligent condition which might reasonably have been anticipated as a contributing cause to the accident to War Minstrel. The infield was not to be used by horses, and the charge in this complaint is not one of bolting but is the act caused by a rider on another horse in the race. The defendant is not an insurer of the safety of horses engaged in a race at its track. The injury in this case was caused by a chain of circumstances which could not reasonably have been anticipated by defendant as a contributing cause to an accident such as happened to War Minstrel. It is well settled in this State that the condition which caused the injury must have been a negligent one which might reasonably have been anticipated as a contributing cause to the accident. (*Storen v. City of Chicago* 373 Ill. 530; *Carr v. Lee J. Behl Hotel Corp.* 321 Ill. App. 432.) In the case of *Merlo v. Public Service Co.*, 381 Ill. 300, the court said (pp. 316, 317):





"This court in the case of Illinois Central Railroad Co., v. Oswald, 338 Ill. 270, has clearly announced the rule applicable in this case. It was there said that if the negligence charged does nothing more than furnish a condition by which the injury is made possible and that condition causes an injury by the subsequent, independent act of a third person, the creation of the condition is not the proximate cause of the injury where the subsequent act is an intervening efficient cause which breaks the causal connection between the original wrong and the injury, and itself becomes the proximate or immediate cause. The cause of an injury is that which actually produces it, while the occasion is that which provides an opportunity for the causal agencies to act. (Briske v. Village of Burnham, 379 Ill. 193.)

For the reasons hereinabove given, we are constrained to hold that the amended complaint sets up no cause of action against the defendant and that the trial court was correct in so holding. Accordingly, the judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

BURKE, P.J., CONCURS,  
KILEY, J., DISSENTING.











Managing Agent of the property of defendant at 3920 Lake Shore Drive, Chicago, "pursuant and in accordance with the terms and provisions of said Plan of Reorganization and, as to compensation to be paid to party of the second part" (plaintiff).

The plaintiff acted as Managing Agent of the property of defendant until March 31, 1941, and on that date he was discharged by the defendant. From the date of the contract of employment until the date of plaintiff's discharge, plaintiff deducted monthly from the gross receipts from said property an amount equal to four per cent of the rental income as his compensation.

At the time of plaintiff's discharge there still remained of the five-year term specified in said contract, the period from April 1, 1941 to July 9, 1942. Because of plaintiff's discharge he rendered no service to defendant during said period. He waited until said period had passed, and instituted suit for an amount equal to four per cent of the gross rental of defendant's property for said period. This amounted to \$3782.41. Upon a trial before a jury, a verdict was rendered in favor of plaintiff for that amount.

The defendant made a written motion for judgment non obstante verdicto setting up that the written contract upon which the plaintiff based his suit was void for lack of mutuality of obligation and because of an absence of a term specifying the compensation to be paid the plaintiff. This motion was denied, and the court entered judgment on the verdict. Defendant appeals.

Construing the contract of employment and the pertinent provisions of the Plan of Reorganization which are referred to in the contract of employment, it can only be determined that the plaintiff was employed by the defendant for a period of five years as Managing Agent of its property with the provision for plaintiff's compensation to be "not to exceed 4% of the gross rental income derived" from the defendant's property.



Managing Agent of the property of defendant at 2220 Lake Shore Drive, Chicago, "pursuant and in accordance with the terms and provisions of said plan of reorganization and, as to compensation to be paid to party of the second part" (plaintiff).

The plaintiff acted as Managing Agent of the property of defendant until March 31, 1941, and on that date he was discharged by the defendant. From the date of the contract of employment until the date of plaintiff's discharge, plaintiff devoted monthly to the gross receipts from this property an amount equal to four per cent of the rental income as his compensation.

At the time of plaintiff's discharge there still remained in the five-year term specified in said contract, the period from April 1, 1941 to July 3, 1942. Because of plaintiff's discharge he rendered no service to defendant during said period. He waited until said period had passed, and instituted suit for an amount equal to four per cent of the gross rental of defendant's property for said period. This amounted to \$252.11. Upon a trial before a jury, a verdict was rendered in favor of plaintiff for that amount.

The defendant made a written motion for judgment non obstante the verdict setting up that the written contract upon which the plaintiff based his suit was void for lack of mutuality of obligation and because of an absence of a term specifying the compensation to be paid to plaintiff. The motion was denied, and the court entered judgment for the plaintiff. Defendant appeals.

Concerning the contract of employment and the pertinent provisions of the plan of reorganization which are referred to in the contract of employment, it can only be determined that the plaintiff was employed by the defendant for a period of five years as Managing Agent of its property with the provision for plaintiff's compensation to be "not to exceed 4% of the gross rental income derived" from

the defendant's property.

Contracts of employment containing the words "not to exceed" as to amount of compensation and duration of time have been pronounced indefinite and uncertain by the courts. In the case of United Press v. New York Press, 164 N. Y. 406, 58 N. E. 527, a contract providing for payment for services in "a sum not exceeding three hundred dollars during each and every week that said news report is received" was held indefinite and uncertain as to amount of compensation, the court saying (p. 528): "It lacked support in one of its essential elements - - in the absence of the price to be paid. That was a defect which was radical in its nature, and which was beyond the reach of oral evidence to supply; for, if the intention of the parties, in so essential a particular, cannot be ascertained from the instrument, neither the court nor the jury will be allowed to make an agreement for them upon the subject. It is elementary in the law that, for the validity of a contract, the promise or the agreement of the parties to it must be certain and explicit, and that their full intention may be ascertained to a reasonable degree of certainty. Their agreement must be neither vague nor indefinite, parol proof cannot be resorted to."

In the case of Harper v. Hassard, 113 Mass. 187, the court construed a contract of employment which described the term of employment as "not exceeding three years" from the date of the agreement. In deciding that the agreement was indefinite as to term of employment the court said (p. 189): "The agreement of plaintiff is to serve the defendant 'during the term of not exceeding three years' that is to say, a term which cannot be more but may be less, than that time. The agreement of the defendants is to pay him a weekly compensation, not for any definite time, but only 'during said term' of three years or less \* \* \*. There is no express agreement of the defendants to employ the plaintiff for three years, and no stipulation from which, in our judgment, such an agreement can be implied."



Contracts of employment containing the words "not to exceed" as to amount of compensation and duration of time have been pronounced indefinite and uncertain by the courts. In the case of United States v. New York Times, 184 N. Y. 406, 38 N. E. 227, a contract providing for payment for services in "a sum not exceeding three hundred dollars during each and every week that said news report is received" was held indefinite and uncertain as to amount of compensation, the court saying (p. 422): "It lacked support in one of its essential elements - in the absence of the price to be paid. That was a defect which was radical in its nature, and which was beyond the reach of oral evidence to supply; for, if the intention of the parties, in so essentially a particular, cannot be ascertained from the instrument, neither the court nor the jury will be allowed to make an agreement for them upon the subject. It is elementary in the law that, for the validity of a contract, the promise or the agreement of the parties to it must be certain and explicit, and that their full intention may be ascertained to a reasonable degree of certainty. Their agreement must be neither vague nor indefinite, partial, nor cannot be reported to."

In the case of Wright v. Wessell, 113 Mass. 187, the court construed a contract of employment which described the term of employment as "not exceeding three years" from the date of the agreement. In deciding that the agreement was indefinite as to term of employment the court said (p. 189): "The agreement of plaintiff as to serve the defendant 'during the term of not exceeding three years' that is to say, a term which cannot be more but may be less, than that time. The agreement of the defendant is to pay him a weekly compensation, not for any definite time, but only 'during said term' of three years or less. There is no express agreement of the defendant to employ the plaintiff for three years, and no stipulation from which, in our judgment, such an agreement can be implied."

Other cases holding that similar language renders the agreement uncertain and indefinite are Campbell v. Jimenes, 27 N. Y. S. 351; Gains v. Reynolds Tobacco Co., 163 Ky. 716; Brooks v. Federal Surety Co., 24 F. (2d) 884.

The plaintiff not having rendered any services during the period after his discharge could not maintain a cause of action upon a quantum meruit, but could recover, if at all, only upon his written contract of employment. The written contract not being definite as to the amount of his compensation plaintiff could not recover upon the same.

The plaintiff offered evidence as to the reasonable value of the services of a managing agent in the city of Chicago for services similar to the services that plaintiff would have rendered if he had rendered services under the agreement. This evidence could not be substituted and read into the contract between the parties so that plaintiff could recover as and for a reasonable value of the services which he did not render to defendant. As shown by the quotation above from United Press v. New York Press, 164 N. Y. 406, and by the quotation hereinafter set forth from Joliet Bottling Co. v. Brewing Co., 254 Ill. 215, oral evidence could not supply the absence of the definite amount of compensation to be paid to plaintiff. The trial court erred in admitting expert evidence of the reasonable value of plaintiff's services which were never rendered to defendant.

The plaintiff claims that the plaintiff and the defendant placed a practical construction upon said written agreement by the defendant paying and the plaintiff accepting from the date of the agreement to the date of plaintiff's discharge an amount each month equal to four per cent of the gross rental income derived from the defendant's property. The plaintiff says that such practical



Other cases holding that similar language renders the agreement uncertain and indefinite are Quinn v. Hines, 27 N. Y. 2d 351; Quinn v. Hines, 133 N. Y. 2d 351; Quinn v. Hines, 133 N. Y. 2d 351; Quinn v. Hines, 133 N. Y. 2d 351.

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The plaintiff claims that the plaintiff and the defendant entered a practical construction upon said written agreement by the defendant paying and the plaintiff accepting from the date of the agreement to the date of plaintiff's discharge an amount each month equal to four per cent of the gross rental income derived from the defendant's property. The plaintiff says that such practical

construction so placed on said employment contract interpreted the vague and indefinite term of the contract of employment, and made definite and certain the amount of plaintiff's compensation at four per cent of the gross rental income derived from the defendant's property, even though the written contract itself may be indefinite. In support of this proposition, the plaintiff cites Nolte v. Hudson Navigation Co., 16 F. (2d) 182; Doyle v. Teas, 4 Scam. 202; Whalen v. Stephens, 193 Ill. 121; Armstrong Paint Works v. Continental Can Co., 301 Ill. 102; Weger v. Robinson-Nash Motor Co., 340 Ill. 81. An examination of those cases shows that they are cases where the contract involved was ambiguous and had been interpreted by the parties to it. In such cases the rule is that courts will regard the interpretation placed upon the contract by the parties as the correct interpretation to be placed upon the contract.

But that rule has no application to a contract which is not ambiguous, but is indefinite in some necessary provision. In the case of Joliet Bottling Co. v. Brewing Co., 254 Ill. 215, the court held that an executory contract between a brewing company and a bottling company lacked mutuality because no definite obligation was incurred by the Bottling company, and with reference to the question of interpretation of the contract by the parties said (p. 219): "Appellant relies upon the rule that where a contract is ambiguous and has been interpreted by the parties to it, courts will regard the interpretation placed upon the contract by the parties themselves. This rule can have no application to a construction of the contract before us because it is not ambiguous, and the intention of the parties to it is not to be determined by evidence aliunde but by the language employed by the contract itself."

In the case of United Press Co. v. New York Press, 164 N. Y. 406, 58 N. E. 527, the same point of practical construction was made and overruled by the court, the court saying: "The



construction to be placed on said employment contract interpreted the  
ague and indefinite terms of the contract of employment, and made  
finite and certain the amount of plaintiff's compensation at four

per cent of the gross rental income derived from the defendant's  
property, even though the written contract itself may be indefinite.

In support of this proposition, the plaintiff cites Boyle v. Wilson

Evolution Co., 107 Ill. 121; Boyle v. Wilson, 208 Ill. 121; Boyle v. Wilson

Boyle v. Wilson, 197 Ill. 121; Boyle v. Wilson, 208 Ill. 121; Boyle v. Wilson

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held that an executory contract between a brewing company and a

bottling company lacked mutuality because no definite obligation was

incurred by the bottling company, and with reference to the question

of interpretation of the contract by the parties said (p. 215):

"Appellant relies upon the rule that where a contract is ambiguous and has

been interpreted by the parties to it, courts will regard the inter-

pretation placed upon the contract by the parties themselves. This

rule can have no application to a construction of the contract before

it is not to be determined by evidence affixed but by the language

employed by the contract itself."

In the case of United Press Co. v. New York Press, 104

N. Y. 105, 32 N. E. 227, the same point of practical construction

was made and overruled by the court, the court saying: "The

appellant claims that, inasmuch as the language of the contract bound the defendant to pay a sum 'not exceeding \$300.00 a week,' by paying that sum for a period of time, it had bound itself through a practical construction of the instrument; and it is also argued that the contract should be construed as one 'to recover the reasonable value of the news service for the unexpired term of the contract, less the costs of performance.' If this were a case where the contract of the parties was merely ambiguous in its terms, it might be permissible to explain them by evidence of their acts, and thus to show a practical construction; but the difficulty with this instrument lies deeper. It lacked support in one of its essential elements -- in the absence of a statement of the price to be paid."

In the case of Weston Paper Mfg. Co. v. Downing Box Co., 293 Fed. 725, the court held that a contract which left the price of goods to be fixed by the seller was void for indefiniteness. The court further held that, though the contract was void for indefiniteness, acceptance by the buyer of the price named for the first three months' deliveries would constitute a binding contract for such quantity, but not for future deliveries, the court saying (p. 728): "Under the authorities (Cold Blast Transportation Co. v. Kansas City Bolt & Nut Co., 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696; Hoffman v. Maffioli, 104 Wis. 630, 80 N. W. 1032, 47 L. R. A. 427; Hopkins v. Racine Malleable & Wrought Iron Co., 137 Wis. 583, 119 N. W. 301; Thayer v. Burchard, 99 Mass. 508; Wickham & Burton Coal Co. v. Farmers' Lumber Co., 189 Iowa, 1183, 179 N. W. 417, 14 A. L. R. 1293) there can be no question but that the goods shipped under contracts void because of uncertainty as to price, yet accepted by the purchaser when delivered, must be paid for, and at the price determined by the standard named in the contract. Such part performance, however, does not validate the entire agreement."





In this case the contract is not ambiguous but is indefinite in one of its vital necessities, a definite amount of compensation to be paid by the defendant to the plaintiff. No evidence of a practical construction can be held to supply that failure to incorporate in the contract that essential provision. The contract must be construed solely from the language found in the contract. That language is too indefinite and uncertain to base a definite and certain agreement between the parties, and, as above set forth, the contract herein involved lacks mutuality.

An additional defense raised by the defendant was that plaintiff's fraudulent conduct caused waste of the defendant's assets with reference to monies expended for the defense of four mandamus suits involving the transfer of capital stock of the defendant and the issue of shares of stock of defendant to himself and Max Thorek, a fellow director, in connection with a tuckpointing job done for the defendant. The defendant contended upon the trial that the plaintiff was guilty of such fraudulent conduct as to justify his discharge. The same evidence was relied upon by the defendant in support of a counter-claim against the plaintiff for moneys which the defendant claims the plaintiff, while acting as president, director and manager of defendant, caused defendant to expend in defense of four mandamus suits made necessary by the wrongful refusal of the plaintiff to transfer stock of defendant corporation on its books and in defense of a suit to set aside the sale of treasury shares to plaintiff and his fellow officer, and director, Max Thorek.

Because of our holding with reference to the claim of plaintiff, it is not necessary to determine whether the actions of the plaintiff relative to his claimed fraudulent conduct, constituted legal grounds for his discharge. The evidence on this question, however, was pertinent on the counter-claim of the defendant.



In this case the contract is not ambiguous but is indefinite in one of its vital necessities, a definite amount of compensation to be paid by the defendant to the plaintiff. So evidence of a practical construction can be held to supply the failure to incorporate in the contract that essential provision. The contract must be construed solely from the language found in the contract. That language is too indefinite and uncertain to pass a definite and certain agreement between the parties, and, as above set forth, the contract herein involved lacks mutuality. An additional defense raised by the defendant was that

plaintiff's fraudulent conduct caused waste of the defendant's assets with reference to money expended for the defense of four managers acting involving the transfer of capital stock of the defendant and the issue of shares of stock of defendant to himself and Max Thork, a fellow director, in connection with a trucking job done for the defendant. The defendant contended upon the trial that the plaintiff was guilty of such fraudulent conduct as to justify his discharge. The same evidence was relied upon by the defendant in support of a counter-claim against the plaintiff for moneys which the defendant claims the plaintiff, while acting as president, director and manager of defendant, caused defendant to expend in defense of four managers while made necessary by the wrongful refusal of the plaintiff to transfer stock of defendant corporation on its books and in defense of a suit to set aside the sale of treasury shares to plaintiff and his fellow director, and director, Max Thork.

Because of our holding with reference to the claim of plaintiff, it is not necessary to determine whether the actions of the plaintiff relative to his claimed fraudulent conduct, constituted legal grounds for his discharge. The evidence on this question, however, was pertinent on the counter-claim of the defendant.

The jury rendered a verdict against the defendant on its counter-claim and the defendant requests this court to enter a judgment here for the amount which it is claimed is shown to have been defendant's damage. The court, however, is of the opinion that a judgment should not be entered in this court upon defendant's counter-claim, but that this cause should be reversed and remanded to the trial court for a new trial upon the question of defendant's counter-claim.

We are of the opinion as above set forth that the trial court erred in admitting the expert evidence of what plaintiff's services would have been worth if he had rendered them, and the admission of such evidence was prejudicial error so far as defendant's counter-claim was concerned. We are further of the opinion that the amount of damages claimed to be due by the defendant on its counter-claim cannot be so accurately determined by us so that a judgment should be entered here upon defendant's counter-claim; the plaintiff may have been justified in employing an attorney with reference to the first mandamus suit, or possibly the second; the plaintiff may have properly sought legal advice on the question of his refusal to transfer the stock and been advised that he should so refuse; the plaintiff may properly claim that the charges of the attorney he employed to give such advice were proper items of corporate expense; the defendant may have properly sought legal advice with reference to the suit instituted to cancel the four hundred shares of stock issued to plaintiff and Thorek. All of these matters and all of the actions of the plaintiff which the defendant claims were fraudulent with resulting waste of corporate assets and damage to the defendant involve a question of good faith and intent on the part of the plaintiff.



The jury rendered a verdict against the defendant on the

counter-claim and the defendant requests this court to enter a

judgment here for the amount which it is claimed is shown to have

been defendant's damage. The court, however, is of the opinion

that a judgment should not be entered in this court upon defendant's

counter-claim, but that this cause should be reversed and remanded

to the trial court for a new trial upon the question of defendant's

counter-claim.

We are of the opinion as above set forth that the trial

court erred in admitting the expert evidence of what plaintiff's

services would have been worth if he had rendered them, and the

admission of such evidence was prejudicial error so far as defendant's

counter-claim was concerned. We are further of the opinion that

the amount of damages claimed to be due by the defendant on the

counter-claim cannot be so accurately determined by us so that a

judgment should be entered here upon defendant's counter-claim; the

plaintiff may have been justified in employing an attorney with

reference to the first mandamus writ, or possibly the second; the

plaintiff may have properly sought legal advice on the question of

his refusal to transfer the stock and been advised that he should so

refuse; the plaintiff may properly claim that the charges of the

attorney he employed to give such advice were proper items of

corporate expense; the defendant may have properly sought legal advice

with reference to the suit instituted to cancel the four hundred

shares of stock issued to plaintiff and therefor. All of these matters

and all of the actions of the plaintiff which the defendant claims

were fraudulent with resulting waste of corporate assets and damage

to the defendant involve a question of good faith and intent in

the part of the plaintiff.

Respectfully,  
The Court.

Very truly,  
The Court.

As the record now stands we feel that it would be beyond our privilege to enter a judgment for a certain definite amount against the plaintiff on defendant's counter-claim. We feel that justice between the parties requires that the plaintiff have every opportunity to defend against defendant's counter-claim, in a trial into which the question of his claimed compensation under the employment contract between the parties does not enter.

This court makes the specific finding that the employment contract between the plaintiff and the defendant is so uncertain and indefinite as to compensation that plaintiff cannot recover thereon. The judgment of the circuit court in favor of the plaintiff and against the defendant in the sum of \$3782.41 will be reversed and judgment entered here in favor of the defendant on plaintiff's claim against the defendant. The judgment of the circuit court against the defendant upon its counter-claim against the plaintiff is reversed and cause remanded for a new trial.

Judgment reversed and cause remanded with directions to enter judgment for defendant and against plaintiff on issues raised on original complaint, and for a new trial on the issues raised by the counter-claim and answer.

JUDGMENT REVERSED, AND REMANDED.

BURKE, P.J. AND KILEY, J. CONCUR.



As the record now stands we feel that it would be beyond

our privilege to enter a judgment for a certain definite amount  
against the plaintiff as defendant's counter-claim. We feel that  
justice between the parties requires that the plaintiff have every  
opportunity to defend against defendant's counter-claim, in a  
trial into which the question of his claimed compensation under the  
employment contract between the parties does not enter.

This court makes the specific finding that the employment  
contract between the plaintiff and the defendant is so uncertain and  
indefinite as to compensation that plaintiff cannot recover thereon.

The judgment of the circuit court in favor of the plaintiff and  
against the defendant in the sum of \$2500.00 will be reversed and  
judgment entered here in favor of the defendant on plaintiff's claim  
against the defendant. The judgment of the circuit court against  
the defendant upon its counter-claim against the plaintiff is reversed  
and cause remanded for a new trial.

Judgment reversed and cause remanded with directions to  
enter judgment for defendant and against plaintiff on issues raised  
in original complaint, and for a new trial on the issues raised by  
the counter-claim and answer.

JUDGE AND REVEREND, AND REVEREND.

U.S. DISTRICT COURT, S.D. CALIF.

43250

3261.A.258

MARGARET McKENZIE, Administratrix  
of the Estate of John McKenzie,  
Deceased,

Appellee,

v.

THOMAS J. FRIEL and CHARLES C.  
RENSHAW, as Trustees, etc., et al.,  
doing business as CHICAGO SURFACE  
LINES,

Appellants.

APPEAL FROM SUPERIOR  
COURT, COOK COUNTY.

314

MR. PRESIDING JUSTICE SULLIVAN DELIVERED OPINION OF THE COURT.

This action was brought by Margaret McKenzie, administratrix of the estate of John McKenzie, deceased, against Thomas J. Friel and Charles C. Renshaw, as Trustees, etc., et al., doing business as the Chicago Surface Lines, to recover for the pecuniary loss alleged to have been sustained by the widow and children of the decedent, who died on July 3, 1943 as the result of injuries he received on July 2, 1943, when he attempted to board a north bound Cottage Grove avenue street car at 37th street. The jury returned a verdict finding defendants guilty and assessing plaintiff's damages at \$10,000. Defendants' motions for judgment notwithstanding the verdict and for a new trial were overruled and judgment was entered in favor of plaintiff on the verdict. Defendants appeal.

Plaintiff's complaint alleged substantially that her intestate, John McKenzie, was standing at 37th and Cottage Grove avenue for the purpose of becoming a passenger on one of defendants' street cars and at about the place where they were accustomed to receive and discharge passengers; that when a north bound street car reached the place where the decedent was standing, the speed of the car was reduced until it was moving not much, if any, faster than a man could walk and apparently for the purpose of receiving him as a passenger;



3201A.258

43270

COURT, COOK COUNTY,  
JULY 2, 1943

ARABEL MCKENZIE, administratrix  
of the estate of John McKenzie,  
deceased,

v.  
THOMAS J. WILK and CHARLES C.  
WILK, as Trustees, etc., et al.,  
doing business as CHICAGO TRUST  
COMPANY,  
Appellants.

THE FOLLOWING JUDGMENT WAS ENTERED BY THE COURT:  
This action was brought by Arabel McKenzie, administratrix of the estate of John McKenzie, deceased, against Thomas J. Wilk and Charles C. Wilk, as Trustees, etc., et al., doing business as the Chicago Trust Company, to recover for the pecuniary loss alleged to have been sustained by the widow and children of the decedent, who died on July 2, 1943, as the result of injuries he received on July 2, 1943, when he attempted to board a north bound Cottage Grove Avenue street car at 37th Street. The jury returned a verdict finding defendants guilty and assessing plaintiff's damages at \$10,000. Defendants' motion for judgment notwithstanding the verdict and for a new trial were overruled and judgment was entered in favor of plaintiff on the verdict. Defendants appeal.  
Plaintiff's complaint alleged and testified that her intestate, John McKenzie, was standing at 37th and Cottage Grove Avenue for the purpose of becoming a passenger on one of defendants' street cars and at about the place where they were accustomed to receive and discharge passengers; that when a north bound street car reached the place where the decedent was standing, the speed of the car was reduced until it was moving not more than a man could walk and  
apparently for the purpose of receiving him as a passenger;

that when the speed of the street car was so reduced, the decedent, while exercising due care and caution for his own safety, attempted to board the car in order to become a passenger thereon; that while he was in the act of boarding said car, but before he had fully and safely boarded same, defendants, by their servants and agents in charge of the street car, although they knew or by the exercise of due care could have known that McKenzie was in the act of boarding it, negligently and without warning increased the speed and started the car forward suddenly, and, as a result thereof, he was thrown violently from the street car to the ground and received the injuries which caused his death.

Defendants' theory as stated in their brief is that "on the morning in question a street car became disabled at or near 38th street causing a blockade or tie-up of street cars at that point; that when the disabled street car was removed from the track, the delayed street cars proceeded north bound and, in order to properly space the street cars on the street again, the first few of the delayed street cars, did not stop at 37th street but continued north to more distant stops so as to relieve the blockade and to properly space the street cars along the street; that by this operation the last of the delayed street cars would stop for passengers at 37th street, which was the first street north of the place of the blockade, without holding up any street cars behind it; that the street car which plaintiff's intestate attempted to board was about the third of the delayed street cars and that there was at least one street car closely following it; that because a number of people were standing close to the track and because of the danger of cross traffic, the motorman reduced the speed of the street car as it approached 37th street; that after the



that when the speed of the street car was so reduced, the decedent, while exercising due care and caution for his own safety, attempted to board the car in order to become a passenger thereon; that while he was in the act of boarding said car, but before he had fully and safely boarded same, defendants, by their servants and agents in charge of the street car, although they knew or by the exercise of due care could have known that McManis was in the act of boarding it, negligently and without warning increased the speed and started the car forward suddenly, and as a result thereof, he was thrown violently from the street car to the ground and received the injuries which caused his death.

Defendants' theory as stated in their brief is that "on

the morning in question a street car became disabled at or near 30th street causing a blockade on the way of street cars at that point; that when the disabled street car was removed from the track, the delayed street cars proceeded north bound and, in order to properly space the street cars on the street again, the first few of the delayed street cars, did not stop at 37th street but continued north to more distant stops so as to relieve the blockade and to properly space the street cars along the street; that by this operation the last of the delayed street cars would stop for passengers at 37th street, which was the first street north of the place of the blockade, without holding up any street cars behind it; that the street car which plaintiff's intestate attempted to board was about the third of the delayed street cars and that there was at least one street car closely following it; that because a number of people were standing close to the track and because of the danger of cross traffic, the motorman reduced the speed of the street car as it approached 37th street; that after the

front end of the street car passed the people who were standing on the street and as soon as the motorman saw that the intersection was clear, he applied the power so as to proceed north on Cottage Grove avenue and that it was in these circumstances that plaintiff's intestate undertook to board the street car while it was in motion."

Plaintiff's intestate had been a machinery mover for 17 or 18 years prior to the accident involved herein. He was about 46 years old and married. He left surviving him a widow and four minor children. He was about six feet tall, in strong physical condition and his hearing and eyesight were good.

On the morning of July 2, 1943 the decedent left his home about 7 A. M. and went to the southeast corner of 37th street and Cottage Grove avenue, as he usually did, to take a north bound Cottage Grove avenue street car to his place of employment. He was waiting with 10 or 15 other people at the regular stopping place for north bound street cars, when the car in question arrived at about 7:15 A. M. These people were "strung out" toward the south from the south crosswalk of 37th street for a distance of approximately the length of a street car and they were standing about 3 feet east of the east rail of the north bound street car track. The decedent was standing about opposite where the rear end of the street car would be if the car stopped at its regular stopping place. Some of the Cottage Grove avenue street cars were front entrance cars and some were rear entrance cars. The street car involved in the accident was a rear entrance car. Its rear platform was open and was not equipped with doors that could be opened or closed. As the rear platform of the street car reached and was passing the



front end of the street car and of the people who were standing on the street and as soon as the motorman saw that the investigation was closed, he applied the power to go to proceed north on Cottage Grove Avenue and that it was in these circumstances that the investigation was closed. It took to board the street car while it was in motion. The investigation had been a completely honest one for 15 or 16 years prior to the accident involving himself. He was about 40 years old and married. He had a family of a wife and four other children. He was about six feet tall, in strong physical condition and his bearing and appearance were good.

On the morning of July 7, 1923, the defendant left his home about 7 A. M. and went to the southwest corner of 7th Street and Cottage Grove Avenue, as he usually did, to take a north bound Cottage Grove Avenue street car to his place of employment. He was waiting with 15 or 17 other people at the regular stopping place for north bound street cars, when the car in question arrived at about 7:15 A. M. These people were waiting only toward the south from the north crosswalk of 7th Street for a distance of approximately the length of a street car and they were standing about 3 feet east of the east rail of the north bound street car track. The defendant was standing about opposite where the rear end of the street car would be if the car stopped at its regular stopping place. Some of the Cottage Grove Avenue street cars were from entrance cars and some were from entrance cars. The street car involved in the accident was a rear entrance car. Its rear platform was open and was not equipped with doors that could be opened or closed, as the rear platform of the street car reached and was passing the

decedent he took hold of the handrail with one hand and put his right foot on the step of the car. While he was in that position in the act of boarding the street car, its speed was suddenly accelerated and he was thrown violently to the pavement.

Only two witnesses testified as to the actual occurrence, Willie Roy Ficklen testifying on plaintiff's behalf and Henry Peels testifying on defendants' behalf.

Ficklen testified substantially that he had a newspaper stand at the southeast corner of 37th street and Cottage Grove avenue; that he was at and about his stand selling newspapers on the morning of July 2, 1943; that it was a "dry and fair" morning; that "it seemed as though the street cars had been tied up \*\*\* there was quite a few people congregated on the corner, waiting on the street car"; that when he first saw the street car which was involved in the accident, it "was approaching the people there \*\*\* going very slow \*\*\* he [the motorman] almost came to a stop, and all of a sudden he started off again, and I heard some woman scream"; that the decedent "reached to get the street car, because the street car was to a stop mostly, and all of a sudden the street car started up" and the man was thrown or fell off; that just as the man had his hand on the handrail of the rear platform and his foot on the step of the car, "the street car started up faster" and he was thrown to the pavement; that in his opinion the street car was traveling at a speed of about "4 to 6 miles an hour" before its speed was suddenly accelerated; that he then saw the street car "stopped" in the intersection - almost at the north side of 37th street; that when the decedent attempted to board the street car, he was standing "in front" of its rear platform; and that when he [Ficklen] first saw the



deceased is not held of the accident with one hand and put  
his right foot on the step of the car. While he was in that  
position in the act of holding the street car, its speed  
was suddenly accelerated and he was thrown violently to the  
ground.

Only two witnesses testified as to the actual occurrence,  
William Boy Jackson testifying on plaintiff's behalf and Henry  
Pelle testifying on defendant's behalf.

William testified substantially that he had a newspaper  
stand at the southeast corner of 37th Street and Cottage Grove  
avenue; that he was at and about his stand selling newspapers  
on the morning of July 4, 1911; that it was a "dry and fair"  
morning; that it seemed as though the street car had been  
tied up and there was quite a few people congregated on the  
corner, waiting on the street car; that when he first saw  
the street car which was involved in the accident, it was  
approaching the people there and going very slow and he  
[the motorist] almost came to a stop, and all of a sudden he  
started off again, and I heard some women scream; that the  
deceased "reached to get the street car, because the street  
car was to a stop mostly, and all of a sudden the street car  
started up" and the man was thrown or fell off; that just as  
the man had his hand on the handrail of the rear platform and  
his foot on the step of the car, the street car started up  
faster and he was thrown to the pavement; that in his opinion  
the street car was traveling at a speed of about 4 to 6 miles  
an hour, before its speed was suddenly accelerated; that he  
then saw the street car "stopped" in the intersection almost  
at the north side of 37th Street; that when the deceased  
attempted to board the street car, he was standing "in front"  
of its rear platform; and that when he [Jackson] first saw the

street car, its front end was passing the point where the decedent was standing and when the decedent attempted to board the street car at its rear entrance, the front end of the street car was about even with the south side of the south crosswalk of 37th street.

Henry Peels testified that he was among those waiting at 37th street for a north bound Cottage Grove avenue street car on the morning in question; that he was over near the news stand and behind the people who were standing a few feet east of the street car track; and that he saw that the north bound street cars were in a "tie-up" at 38th street and that "there was about 6 or 7 passed without stopping, because they was lined up." The following then occurred on his direct examination: "Q. When one of the cars came by there, did you notice a man try to board the street car? A. Sure, I was standing right out there while he was boarding the street car. Q. When he tried to board the street car, was the street car moving? A. Yes, moving along. Q. And what part of the street car did he make a grab for? A. The back end. Q. And what part of the street car did he touch? A. He caught hold of the rod and put his right foot on the running board. That is what he caught onto."

Peels testified on cross-examination that he saw the street car in question when it left 38th street; that he "couldn't tell how fast it run" but he knew "it was going fast" when the decedent "went to catch it, but I couldn't tell you how fast it was"; that the street car slowed down "just a little bit" before it got to 37th street; that when the street car reached 37th street, "it was pretty slow, but I don't know how many miles it was"; that "there was no bell rung by the motorman"; that the decedent was standing



street car, its front end was passing the point where the  
witness was standing and when the defendant attempted to  
board the street car at its rear entrance, the front end  
of the street car was about even with the south side of the  
south crosswalk of 37th street.

The witness testified that he was among those waiting  
at 37th street for a north-bound street car and was over near the  
car on the morning in question; that he was over near the  
news stand and behind the people who were standing a few  
feet east of the street car track; and that he saw that the  
north-bound street car was in a "stop" at 37th street  
and that "there was about 5 or 6 people waiting to board,  
because they were lined up." The following then occurred on  
his direct examination: "Q. When one of the cars came by  
there, did you notice a man try to board the street car?  
A. Yes, I was standing right out there while he was boarding  
the street car. Q. When he tried to board the street car,  
was the street car moving? A. Yes, moving along. Q. And  
what part of the street car did he reach a grab for?  
A. The back end. Q. And what part of the street car did he  
touch? A. He caught hold of the rod and put his right foot  
on the running board. That is what he caught onto."

Peels testified on cross-examination that he saw the  
street car in question when it left 37th street; that he  
"couldn't tell how fast it was" but he knew "it was going  
fast" when the defendant went to board it, but he couldn't  
tell you how fast it was; that the street car slowed down  
"just a little bit" before it got to 37th street; that when  
the street car reached 37th street, "it was pretty slow,  
but I don't know how many miles it was"; that "there was no  
bell rung by the motorman"; that the defendant was standing

"closest to the rear end of the street car"; that when the street car reached the intersection it "put on speed"; and that McKenzie was "flung" 10 feet by the car.

Harold Johnson testified that he was the motorman of the north bound Cottage Grove avenue street car which was involved in the accident; that when his car arrived at 38th street, there were three street cars standing on the north bound track ahead of him, the first of which was "a disabled car"; that when the disabled car was removed, the other two cars ahead of him proceeded northward and he followed shortly thereafter; that his car was delayed at 38th street approximately 4 minutes; that as he proceeded northward between 38th street and 37th street he saw approximately 10 or 12 people standing south of 37th street "in the regular boarding position" for north bound street cars; that he saw that the street car immediately ahead of him did not stop either at 37th street or 36th street; that as he approached 37th street he made up his mind not to stop there but to stop at 36th street and let the car behind him pick up the people waiting at 37th street; that "customarily whenever there is a delay in the service like that, it is proper to space the street out and get the cars \*\*\* on their scheduled space again. If the first car or any one car stops and tries to pick up all passengers, the delay will not be cleared up and there will be more of a delay as you go along the right of way"; that as he approached the people standing at the regular stopping place south of 37th street he slowed his car down "to about 8 or 10 miles an hour" and "rang the gong and made sure there was no one standing in front of the car or crossing the street"; that he "rang the gong" to warn the people who were standing out in the street of the approach of his car and that "they stepped back a little bit"; that when these people stepped back and he



"closest to the rear end of the street car"; that when the street car reached the intersection it "put on speed"; and that the car was "flying" as lost by the car.

Harold Johnson testified that he was the motorist of

the north bound Cottage Grove Avenue street car which was

involved in the accident; that when his car arrived at 36th

street, there were three street cars standing on the north

bound track ahead of him, the first of which was "a disabled

car"; that when the disabled car was removed, the other two

cars ahead of him proceeded northward and he followed shortly

thereafter; that his car was delayed at 37th street approxi-

mately 4 minutes; that as he proceeded northward between 36th

street and 37th street he saw approximately 10 or 12 people

standing south of 37th street in the regular boarding position.

For north bound street cars; that he saw that the street car

immediately ahead of him did not stop either at 37th street or

38th street; that as he approached 37th street he made up his

mind not to stop there but to stop at 38th street and let the

car behind him pick up the people waiting at 37th street;

that "consequently, whenever there is a delay in the service

like that, it is proper to space the street car and get the

cars out on their scheduled space again. If the first car

on any one stop and tries to pick up all passengers,

the delay will not be cleared up and there will be more of a

delay as you go along the line of cars; that as he approached

the people standing at the regular stopping place south of

37th street he slowed his car down "to about 5 or 10 miles an

hour" and "rang the bell and made sure there was no one stand-

ing in front of the car or crossing the street"; that he "rang

the bell" to warn the people who were standing out in the

street of the approach of his car and that "they stopped back

a little bit"; that when these people stopped back and he

saw that there was no traffic on 37th street, he continued northward across 37th street, accelerating his speed "slightly"; that when he stopped his car after receiving the emergency bell from his conductor its "rear end was about even with the north crosswalk of 37th street"; and that after he left 38th street the highest speed his car attained was about 15 or 16 miles an hour, when he was in the middle of the block between 38th street and 37th street.

The testimony of Thomas Hynes the conductor was to the same effect as that of the motorman concerning the tie-up of the north bound cars at 38th street, the extent of the delay and the number of cars affected by the blockade. He further testified that shortly after his car left 38th street, he saw a number of people standing at the regular stopping place south of 37th street waiting for a north bound car; that as his car "neared 37th street" he heard the motorman "ring his bell" and that signal indicated to him that "he was not going to stop at that intersection"; that as his car approached 37th street "it possibly slowed down to approximately 8 or 10 miles an hour to cross the intersection"; that he was standing on the rear platform in his "regular position" for collecting fares, with his back to the body of the street car and facing southward "as the car approached the intersection"; that he "only heard the thud of a man against the back end of the car"; that he then "looked toward the outside of the car and saw this man fall to the street"; that he immediately "pulled the emergency bell for a stop" and the car stopped with its rear end "approximately a car length north of 37th street"; that he did not at any time see the man "on the platform or on the step" before he saw him strike the back end of the car and fall to the street; and that immediately after he saw the man strike the



that there was no traffic on 37th Street, in connection

with the accident, according to the report.

"Slightly," but when he stopped his car after receiving

the message, he left his car at the "rear end" of

about even with the north entrance of 37th Street; and

that after he left 37th Street the highest speed his car

attained was about 15 or 16 miles an hour, when he was in

the middle of the block between 37th Street and 38th Street.

The testimony of these witnesses the coroner was to the

same effect as that of the witnesses concerning the time of

the north-bound car at 37th Street, the extent of the delay

and the number of cars affected by the accident. The witness

testified that shortly after his car left 37th Street, he

saw a number of people standing at the regular stopping place

south of 37th Street waiting for a north-bound car; that as

his car "nearly" 37th Street, he heard the woman crying "help

help" and that signal indicated to him that "he was not going

to stop at that intersection; that as his car approached 37th

Street "it possibly moved down to approximately 8 or 10 miles

an hour to cross the intersection"; that he was standing on the

rear platform in his "regular position" for collecting fares,

with his back to the body of the street car and looking eastward

"as the car approached the intersection"; that he "only heard

the sound of a car against the back end of the car"; that he

then "looked toward the outside of the car and saw this man

fall to the street"; that he immediately "called the emergency

bell for a stop" and the car stopped with its rear end "approx-

imately a car length north of 37th Street; that he did not at

any time see the man "on the platform or on the steps" before

he saw him strike the back end of the car and fall to the

street; and that immediately after he saw the man strike the

rear end of the platform the street car increased its speed.

Defendants presented in evidence Section 81 of the Uniform Traffic Code of the City of Chicago, which provides as follows:

"It shall be unlawful for any person to board or alight from a street car or vehicle while said street car or vehicle is in motion."

Defendants first contend that as a matter of law their liability was not shown by any facts and circumstances disclosed by the evidence. In other words they claim that all reasonable minds must agree that plaintiff failed to show actionable negligence on their part and that the decedent was in the exercise of ordinary care for his own safety at and immediately prior to the time of the accident. There is no merit in this contention, since there can be no question but that the testimony of plaintiff's witness Ficklen and of defendants' witness Peels tends to show that while attempting to board the car the decedent was injured in the manner alleged in the complaint and by reason of defendants negligence as therein alleged.

In Klinck v. Chicago City Ry. Co., 262 Ill. 280, it was held that recovery could be had under a factual situation practically identical with that presented here. There Klinck was attempting to board a north bound Cottage Grove avenue street car at a customary stopping place after the defendant through its servants had reduced the speed of its car until it was moving not much, if any, faster than a man could walk and, while he was in the act of boarding the car but before he had fully and safely boarded same, the speed of the street car was suddenly increased without warning and he was thrown to the ground and injured. In that case the court said at pp. 284, 298:



rear end of the vehicle the street car increased its speed.

Defendants presented in evidence section 21 of the Uniform Traffic Code of the City of Chicago, which provides as follows:

"It shall be unlawful for any person to board or alight from a street car or vehicle while said street car or vehicle is in motion."

Defendants first contend that as a matter of law their liability was not shown by any facts and circumstances disclosed by the evidence. In other words they claim that all reasonable minds must agree that plaintiff failed to show actionable negligence on their part and that the decedent was in the exercise of ordinary care for his own safety at and immediately prior to the time of the accident. There is no merit in this contention, since there can be no question but that the testimony of plaintiff's witness, driver and of defendants, witness Teela tends to show that while attempting to board the car the decedent was injured in the manner alleged in the complaint and by reason of defendants negligence as therein alleged.

In Lincoln v. Chicago City Ry. Co., 207 Ill. 280, it was held that recovery could be had under a factual situation practically identical with that presented here. There plaintiff was attempting to board a north bound Cottage Grove Avenue street car at a customary stopping place after the defendant through the servants had increased the speed of the car until it was moving not much, if any, faster than a man could walk and, while he was in the act of boarding the car, but before he had fully and safely boarded same, the speed of the street car was suddenly increased without warning and he was thrown to the ground and injured. In that case the court said at

"As **Klinck** was standing at a place where plaintiff in error was accustomed to receive and discharge passengers for the purpose of boarding the car, and as the speed of the car was reduced as it approached the place where he was standing, apparently for the purpose of receiving and discharging passengers, the relation of passenger and carrier existed between him and plaintiff in error when he attempted to board the car and was injured \*\*\*. \*\*\* While it is necessary to prove either an express or implied contract of carriage between the carrier and the alleged passenger, yet the act of the carrier in stopping a street car, or in bringing it almost to a stop, at a place where it is accustomed to receive and discharge passengers, is an implied invitation to persons intending to take passage thereon at that place to board the car, and the act of any such person attempting to board the car is an acceptance of the implied invitation and creates the relation of carrier and passenger. It is the duty of those in charge of the car to know whether or not the implied invitation has been accepted, and the carrier cannot escape liability by showing that its employees in charge of the car did not know that the person who has accepted the implied invitation intended to board the car."

In Little v. Peoria Railway Co., 215 Ill. App. 385, it was claimed that the plaintiff was injured while in the act of boarding a slowly moving street car at its usual stopping place. There the court said at pp. 388, 389:

"Appellant also contends that if the car was in motion when she started to get upon it, she cannot recover. \*\*\* It is the settled law of this State that it is not negligence per se for a person to get upon a street car when it is in motion, and that the question whether, under the particular circumstances of the case, the act of the person so getting upon a street car in motion is negligence in fact, contributing to the resulting injury, is for the jury. Cicero & P. St. Ry. Co. v. Meixner, 160 Ill. 320; North Chicago St. Ry. Co. v. Wiswell, 168 Ill. 613; South Chicago City Ry. Co. v. Dufresne, 200 Ill. 456; Chicago Union Traction Co. v. Lundahl, 215 Ill. 289; Kelly v. Chicago City Ry. Co., 283 Ill. 640. \*\*\* The courts recognize that there may be a tacit invitation to get upon a street car."

In Kern v. United Rys. Co. of St. Louis, 214 Mo. App. 232 (259 S. W. 821), in discussing the law applicable to a similar factual situation, the court said at p. 242:

"In the present case defendant's car in response to decedent's signal, was slowed down until it had come almost, if not quite, to a dead stop, with the doors open and the step lowered, at the precise place where defendant was accustomed to receive and discharge passengers. Thereupon decedent attempted to board the car. He placed one foot upon the lowered step and reached for the handrail, and while thus in the act of boarding the car and while his body





was poised on one foot and before he had obtained hold on the handrail, the car went forward with a sudden jerk or acceleration of speed and proceeded on its way, and the decedent was thrown from the step under the trailer and was dragged to his death. To say that a public carrier may thus, with its car and trailer, set a trap for an intending passenger and spring it at the opportune instant and throw him under the trailer to his death, and not be required to answer in damages therefor, would be to announce a doctrine no court could tolerate, much less approve."

It is next contended that the verdict <sup>was</sup> against the manifest weight of the evidence.

Defendants stress the custom of their motormen in spacing the street cars after a blockade so as to reestablish their schedules and argue in effect that the testimony of the motorman and conductor as to the manner in which the street car in question was operated, considered in the light of such custom, shows conclusively that decedent was guilty of contributory negligence in attempting to board the moving street car and that they were not guilty of the negligence charged in the complaint. However, this custom does not and could not have the conclusive significance which defendants seem to attribute to it. The only possible purpose that could be served by the evidence as to said custom was to attempt to account for the failure of the motorman to stop his car at 37th street and to fortify the testimony of the motorman and conductor as to the manner in which the car was operated as it approached, reached and passed the point where the decedent was waiting at the regular stopping place at 37th street. Certainly it cannot be said that if the evidence shows that the decedent, while in the exercise of due care, received his fatal injuries as the result of the negligent operation of the particular car, plaintiff would be precluded from recovery by reason of such custom. Furthermore, the motorman testified that he would not have violated this custom or any





regulation of defendants if he did stop his car at 37th street, particularly after two of the delayed cars had already passed up the intending passengers waiting at that street. The evidence of primary concern herein is that bearing upon the conduct of the decedent and the manner in which the particular street car was operated at and prior to the time of McKenzie's injury and the only real conflict in the evidence, as we view it, was as to the speed at which the car was moving at and immediately prior to the time the decedent attempted to board it.

If, when the car reached the place where McKenzie was standing, its speed had been reduced apparently for the purpose of receiving him as a passenger and it was then moving no faster than a man could walk, under the law he had a right to board it and the law is settled in this state that when a passenger attempts to board a street car under such circumstances and is injured by reason of a sudden increase in its speed without warning and before he has fully and safely boarded the car, the street car company will be required to respond in damages for such injury.

As heretofore shown, Ficklen testified that as the front end of the car passed McKenzie and as its rear entrance reached him the street car was "going very slow," it "almost came to a stop" and it was traveling at a speed of about "4 to 6 miles an hour." Peels, who was defendants' only occurrence witness, corroborated Ficklen by his testimony that when the front end of the car reached 37th street, "it was going pretty slow." Opposed to this testimony is that of the motorman and conductor that the speed of the car was not reduced lower than 8 or 10 miles an hour as it approached and passed the people waiting at 37th street. This conflict in the evidence as to



regulation of defendant if he did stop his car at 37th street, particularly after the fact of the accident. It was also stated up the incident happened while it was stopped. The evidence of primary concern is that defendant was the cause of the accident and the manner in which the accident occurred was operated at and prior to the time of defendant's injury and the only real conflict in the evidence, as we view it, was as to the speed at which the car was moving at and immediately prior to the time the accident occurred to board it.

12. When the car reached the place where defendant was standing, it speed had been reduced sufficiently for the purpose of receiving him as a passenger and it was then moving no faster than a man could walk, under the law he had a right to board it and the law is settled in this state that when a passenger attempts to board a street car under such circumstances and is injured by reason of a sudden increase in its speed without warning and before he has fully and safely boarded the car, the street car company will be required to respond in damages for such injury.

As heretofore shown, witness testified that at the front end of the car passed defendant and as the rear end was reaching him the street car was "going very slow," it almost came to a stop and it was traveling at a speed of about 4 to 6 miles an hour." "Well, who was defendant's only companion witness, corroborated witness by his testimony that when the front end of the car reached 37th street, "it was going pretty slow." Opposed to this testimony is that of the motorist and conductor that the speed of the car was not reduced lower than 8 or 10 miles an hour as it approached and passed the people waiting at 37th street. This conflict in the evidence as to

the speed of the car presented a question of fact for the jury to determine and by its verdict the jury resolved that question and all other material questions of fact in favor of plaintiff.

Defendants assert that "if it were the fact that the street car involved in the accident, as it approached and undertook to pass the people standing at 37th street and the intersection there, was being operated in a manner appreciably different than the preceding street cars were operated as they approached and passed, so as to lead Mr. McKenzie, as a reasonably prudent man, to believe that this particular street car was going to stop there or that he was being invited to board the same as a passenger, it was incumbent upon plaintiff to make such proof." This argument is entirely lacking in merit and plaintiff had no such burden. It would impose an unwarranted burden upon plaintiff to require her to prove that the car in question was operated in an appreciably different manner than the two preceding cars, since those cars or the manner in which they were operated had nothing to do with the accident.

Defendants seek to make a point of the fact that the car was actually passing the stopping place when McKenzie attempted to board it at its rear entrance. It is a matter of common knowledge and experience that a street car is not always stopped exactly at its regular stopping place. If this car had almost come to a stop or slowed down to a walking pace when its rear platform reached the point where the decedent was standing, as Ficklen testified, McKenzie had the right to assume that it would come to a stop within a very short distance and the fact that the motorman might not bring his car to a dead stop until its front end projected somewhat over the crosswalk could not affect the rights of a person



The speed of the car presented a question of fact for the jury to determine and by its verdict the jury resolved that question and all other material questions of fact in favor of Plaintiff.

Defendants assert that at the time the accident occurred the car was involved in the accident, as it approached and undertook to pass the people standing at Fifth Street and the intersection there, was being operated in a manner appreciably different from the preceding street cars which were operated as they approached and passed, so as to lead Mr. Williams, as a reasonably prudent man, to believe that this particular street car was going to stop there or that he was being invited to board the same as a passenger, it was incumbent upon Plaintiff to make such proof. This argument is entirely lacking in merit and Plaintiff had no such burden. It would impose an unnecessary burden upon Plaintiff to require her to prove that the car in question was operated in an appreciably different manner from the two preceding cars, since those cars on the manner in which they were operated had nothing to do with the accident.

Defendants seek to make a point of the fact that the car was actually passing the stopping place when Williams attempted to board it at its rear entrance. It is a matter of common knowledge and experience that a street car does not always stop exactly at its regular stopping place. If this car had almost come to a stop or slowed down to a walking pace when its rear platform reached the point where the defendant was standing, as William testified, Williams had the right to assume that it would come to a stop within a very short distance and the fact that the motorman might not bring his car to a dead stop until its front end projected somewhat over the crosswalk could not affect the rights of a person

properly attempting to board it at its rear entrance.

It is urged that it is significant that neither the decedent nor anyone else waiting at 37th street showed any intention to attempt to board the car as it was passing until McKenzie "made a grab for it just as the rear end was passing and the motorman applied the power." There is no force to this argument. The very presence of these people waiting at a regular stopping place was sufficient indication of their intention to board the first car that stopped to pick them up. The only place they could board this particular car was at its rear entrance and it is idle to urge that as the motormen passed them they showed no intention of boarding the car. It is also suggested that it is significant that no one else attempted to board the car. No one else had an opportunity to board it, because when McKenzie who was closest to the rear entrance did attempt to board the car, he was thrown off by its sudden increase in speed. Defendants' argument that nobody signalled the car to stop does not merit serious consideration. The presence of 10 or 15 people at a regular stopping place was in itself all the signal necessary. As has been seen, defendants presented in evidence an ordinance of the City of Chicago declaring it to be unlawful for any person to board or alight from a street car while same is in motion. While it is the rule that the violation of a safety ordinance is prima facie evidence of negligence, "it is the settled law of this State," as stated in Little v. Peoria Railway Co., supra, "that it is not negligence per se for a person to get upon a street car when it is in motion, and that the question whether, under the particular circumstances of the case, the act of the person so getting upon a street car in motion is negligence in fact, contributing to the resulting injury, is for the jury."

Whether under the evidence in the instant case the decedent



properly attempting to board it at the rear entrance. It is urged that it is a violation of the ordinance which forbids any person from alighting from a street car while it is in motion. While it is the rule that the violation of a safety ordinance is prima facie evidence of negligence, it is the settled law of this State, as stated in Little v. Local Delivery Co., supra, "that it is not negligence per se for a person to get upon a street car when it is in motion, and that the question whether, under the particular circumstances of the case, the act of the person so getting upon a street car in motion is negligence in fact, contributing to the resulting injury, is for the jury."

Whether under the evidence in the instant case the defendant

was at its rear entrance and it is able to urge that as the motorist passed them they should be intended to boarding the car. It is also suggested that it is a violation of the ordinance that no one else attempted to board the car. No one else had an opportunity to board it, because when defendant was closest to the rear entrance did attempt to board the car, he was thrown off by its sudden increase in speed. Defendant's argument that nobody alighted the car to stop does not merit serious consideration. The presence of 10 or 12 people at a regular stopping place was in itself all the signal necessary. As has been seen, defendants presented in evidence an ordinance of the City of Chicago declaring it to be unlawful for any person to board or alight from a street car while it is in motion. While it is the rule that the violation of a safety ordinance is prima facie evidence of negligence, it is the settled law of this State, as stated in Little v. Local Delivery Co., supra, "that it is not negligence per se for a person to get upon a street car when it is in motion, and that the question whether, under the particular circumstances of the case, the act of the person so getting upon a street car in motion is negligence in fact, contributing to the resulting injury, is for the jury."

was free from contributory negligence and the defendants were guilty of the negligence charged in the complaint were purely questions of fact that were properly submitted to the jury for its determination and in our opinion there was ample evidence to justify the verdict.

Defendants contend that the trial court erred in refusing to give the following instruction:

"When circumstances and delays in the operation of a street car service make the stopping of a car to take on passengers at a street intersection impractical, there is no duty or law requiring the street car to stop."

This instruction was properly refused because it attempted to inject an irrelevant and fictitious issue into the case. The gravamen of plaintiff's complaint and the theory upon which the case was tried was not that defendants were negligent because of the failure of their street car to stop at 37th street but that they were negligent in suddenly accelerating its speed while McKenzie was in the act of boarding it, after they had extended to him an implied invitation to board the car by slowing down to not more than a walking pace apparently for the purpose of taking on passengers.

Defendants also complain of the refusal of the trial court to give their submitted instruction No. 32. This instruction was properly refused because certain portions of it did not correctly state the law applicable to this case. That part of the instruction which did correctly state the law was covered by another instruction submitted by defendants, which was given.

For the reasons indicated herein the judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Friend and Scanlan, JJ., concur.





42492

WILLIAM S. HENNESSEY,

Appellant,

v.

KENNETH RAFFERTY, GEORGE R. BENSON,  
ANNA M. BENSON, CHICAGO TITLE AND TRUST  
COMPANY, as Trustee under Trust Deed made  
by Kathryn O'Malley, dated July 22,  
1925, recorded in the Recorder's Office  
of Cook County, Illinois, as Doc.  
No. 8987053, and as Trustee under Trust  
Deed made by Kenneth Rafferty, dated  
November 30, 1928, recorded in the  
Recorder's Office of Cook County,  
Illinois, as Doc. No. 10226599, VICTOR  
C. CARLSON, CHARLOTTE CARLSON, KATHRYN  
O'MALLEY and UNKNOWN OWNERS,  
Appellees.

326 I.A. 259<sup>1</sup>

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The plaintiff, William S. Hennessey, appeals from a decree of the Superior court foreclosing two trust deeds, wherein the chancellor adjudicated the amount due him and directed the sale of the premises, but found and adjudicated that defendants George R. Benson and his wife Anna were not personally liable for any deficiency resulting from the sale.

From more than 700 pages of testimony adduced upon the hearing before the master in chancery to whom the cause was generally referred, it appears that plaintiff owned five lots located at Clark and Howard streets in Evanston, carrying title in the name of his dummy Kathryn O'Malley. The property was encumbered by two mortgages of \$20,000 each, signed by Kathryn O'Malley, both of them owned and held by plaintiff who was at the time the real owner of the property. Victor C. Carlson, a builder, had developed a large section of the neighborhood in which the property was located, and in pursuance of a plan to erect other buildings, sought an option for the purchase of the property through one Phelan, a broker, with whom plaintiff had listed the property for



1914

275

...

022.47688

*[Faint, illegible text]*

[illegible]

1. That the plaintiff has been injured by the defendant's negligence in the operation of the elevator and in the use of the same, and that the defendant is liable for the same.

sale. By means of negotiations carried on through his manager Elwood L. Williams, Carlson obtained an option in favor of Alfred E. Williston, a young lawyer associated with Carlson's attorneys. The option, dated August 11, 1928, gave Williston the privilege of acquiring the property subject to the two existing mortgages of \$20,000 each, and the payment of \$125,000 cash. The mortgages were dated August 23, 1922 and July 22, 1925, respectively, and were due by extension August 23, 1929 and July 22, 1930, respectively. Subsequently Carlson secured a modification of the option reducing the cash requirements by providing for the execution and delivery by Williston of a purchase-money mortgage of \$60,000 and cash amounting to \$65,000 against a deed subject to \$40,000 in mortgages. Williston exercised the option at the direction of Carlson, who deposited \$5500 as the requisite earnest money, and caused Williston to execute an acceptance of the option on October 15, 1928. By the terms of the option Kathryn O'Malley was required to deliver a preliminary report of title of the Chicago Title and Trust Company within 20 days after the earnest money was deposited, and if no defects appeared, Williston was required to pay the balance of the purchase price, \$59,500, in cash, and to execute and deliver the purchase-money mortgage for \$60,000. The foregoing transactions preceded any involvement of George R. Benson, who was not approached in the transaction by anyone until the late summer or fall of 1928. There is a conflict in the evidence with respect to the time Benson was first approached. Williams gave his recollection of the time as 10 or 15 days after August 11, the date of the original option, whereas Benson stated positively that he was in Colorado from



[illegible]

August 18 to the middle of September and did not meet Williams until after the 15th of October. Carlson lacked the cash with which to complete the transaction, and Williams therefore attempted to induce Benson to lend Carlson the necessary \$65,000. Carlson produced financial statements showing him to be worth around \$7,000,000. He offered to pay 10 per cent commission and 6 per cent interest for the use of the money that Benson was asked to advance, and offered to put up 500 shares of Orrington Hotel stock then worth approximately \$150 per share, and to assign several hundred thousand dollars of life insurance as security for the loan of \$65,000.

Benson discussed the proposal with his attorney, who counseled against taking Carlson's obligation, which required the payment of 16 per cent in interest and commission, because of usury, and suggested instead that Carlson convey the property when his deal was completed, to Benson, and sign a contract personally obligating himself to pay the amount in question to Benson, and to receive from Benson a conveyance of the property when payment was made. To secure his undertaking Carlson deposited 500 shares of Orrington Hotel stock and \$200,000 of life insurance.

November 28, 1928 Williston assigned his option to Kenneth Rafferty, and two days thereafter Carlson, Hennessey, Penwell and Benson entered into an escrow agreement at the Chicago Title and Trust Company with Rafferty, which provided, among other things, that Kathryn O'Malley should deposit a deed to Rafferty subject to \$40,000 in mortgages, against \$59,281.33 and Rafferty's \$60,000 second mortgage. It also provided that Rafferty was to deposit a deed to Benson, subject to \$100,000 in mortgages, and Benson was to deposit \$62,500 to be used when the Chicago Title and Trust Company





was ready to guarantee title to him.

Benson and others in the pool who made up the amount of \$62,500, which was the figure finally agreed upon as the amount of the loan, made the sum available to Benjamin S. Mesirow, Benson's attorney, and on December 5, 1928 that amount was deposited by him in escrow with the Chicago Title and Trust Company, under the complete escrow agreement of November 30, 1928 between Carlson, Penwell, <sup>Benson</sup> and Hennessey. When the money was deposited, Mesirow signed the escrow agreement on behalf of Benson. The provisions of the escrow were subsequently carried out, as agreed, and Benson emerged from the transaction with the title, subject to \$100,000, received the Orrington Hotel stock and insurance policies from Carlson, and held these securities as collateral security for Carlson's direct obligation to pay Benson the amount of his advancement and his profit under the terms of their agreement.

Subsequently Carlson went into bankruptcy and scheduled his contract with Benson. The Orrington Hotel was foreclosed and Benson received nothing on the 500 shares of stock held by him as collateral. The insurance policies lapsed for nonpayment of premiums and Benson received \$439, which was the cash value of one of the policies. Carlson never performed under his contract with Benson, and when the second mortgage of \$60,000 became due and after foreclosure thereon was instituted, Benson paid \$25,000 on account of the principal, executed extension agreements under which the balance of \$35,000 and also the two \$20,000 mortgages would mature January 15, 1933, subject to the payment of interest in the interim. The extension agreements contained no



was ready to purchase the stock of  
Benson and others in the bank for the amount of  
\$20,000, which was the figure finally agreed upon by the  
board of the bank, and the stock was sold to Benson and  
others, Benson's attorney, and on December 2, 1931 that  
amount was deposited by him in a bank with the Chicago title  
and trust company, under the certificate of deposit of  
November 10, 1931 between Benson, Benson's attorney,  
Benson and others, which stated that the stock  
when the money was deposited, Benson signed the stock  
agreement on behalf of Benson. The provisions of the stock  
were substantially identical to the agreement, and Benson changed  
from the terms of the stock, subject to \$20,000,  
received the certificate of stock and insurance policies  
from Benson, and held these securities as collateral security  
for Benson's direct obligation to pay within the amount of  
his agreement and his profit under the sale of their  
agreement.  
Subsequently Benson went into bankruptcy and scheduled  
his contract with Benson. The certificate of stock was developed  
and Benson received nothing on the 700 shares of stock held  
by him as collateral. The insurance policies issued for  
the amount of premiums and interest received \$435, which was  
the cash value of one of the policies. Benson never per-  
formed under his contract with Benson, and when the second  
mortgage of \$20,000 was paid and after forfeiting the same  
was forfeited, Benson paid \$2,000 on account of the  
principal, amount of extension agreement which was the  
balance of \$35,000 and also the two \$20,000 mortgages which  
were January 15, 1933, subject to the payment of interest  
in the future. The extension agreements contained no

assumption clause or any undertaking to pay the principal. Benson paid all the interest coupons as they matured.

The plaintiff, Hennessey, sold one of the \$20,000 mortgages to his brother-in-law, Peter J. Werwecke, and advanced the money with which Werwecke foreclosed the mortgage to which Hennessey and the maker, Kathryn O'Malley, became parties defendant. That proceeding resulted in a finding of personal liability of the maker, Kathryn O'Malley, but not of Benson. Hennessey acquired the master's certificate of sale resulting from the foreclosure as collateral security for money he had advanced for the foreclosure. Werwecke died and Hennessey became one of the executors of his will and inventoried the master's certificate subject to the agreement under which he, Hennessey, was to receive certain monies out of the sale of the property covered by the certificate.

It appears that prior to January 15, 1930 Hennessey had pledged with the Sheridan Trust and Savings Bank, as collateral for several loans, the two mortgages involved in this proceeding, as well as other securities. In 1935 he compromised his liability to the bank, which had gone into receivership, by turning over to the receiver thereof, the two mortgages in question, and obtained absolution from his liabilities to the receiver. Nothing further was done with the two mortgages until September 12, 1939, when Hennessey, purporting to act for Josephine Werwecke, his sister, made an offer to the receiver of the bank to purchase the \$20,000 mortgage and the \$35,000 second mortgage for \$2,500. That offer was accepted. In his proposal to the receiver no claim or disclosure was made that Benson was personally liable for the amount of the mortgages. Later, on November 27, 1939, Hennessey wrote to the deputy receiver of the bank requesting an explanation of



...to pay the principal.  
...all the interest coupons as they matured.  
The dividend, however, sold one of the 100,000 notes  
...to his brother-in-law, Peter J. ... and ...  
...the money with which ... the ... to which  
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... That ... in a ... of ...  
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It appears that prior to January 15, 1915, ... had  
... with the ... and ... as ...  
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... later, on November 15, 1915, ... was to  
... the ... of the ... an ... of

the transaction whereby he was released from liability, and stated that "the only paper which had any value was the six (6) shares of stock in the Howard Avenue Trust & Savings Bank, with stock power attached." Hennessey now claims to be the owner of the mortgages and brought these foreclosure proceedings thereon three months after the entry of an order granting leave to the receiver to make the sale, and he seeks to charge Benson with personal liability on the two mortgages which he acquired from the receiver and which had matured January 15, 1933.

Among the evidence introduced before the master were documents pertaining to the purchase by Rafferty through the escrow, and a sale by O'Malley of the property in question to Rafferty under the terms of the escrow, which provides that Benson would deposit \$62,500, to be used when the Chicago Title and Trust Company was ready to guarantee title to him, subject to mortgages of record and a \$60,000 second mortgage signed by Rafferty. In neither the O'Malley nor the Rafferty deed does the grantee assume and agree to pay the mortgages; nor is any liability assumed or imposed on Benson by the extension agreement signed by him January 15, 1930. It clearly appears from the evidence of Benson, Mesirov and Williams that the transaction between Carlson and Benson was a loan, and no effort was made to disprove that fact. Plaintiff seeks, however, to change Benson's position as a lender of money to that of a purchaser from O'Malley, and thus to impose on Benson obligations which were not his and to which he was a stranger. The question presented is whether the transaction constitutes a liability as to Benson.

The law is well settled in this state that a deed to real estate made contemporaneously with a contract of repurchase may be shown to be a conveyance intended as a mortgage.



the University whereby he was released from liability, and  
stated that "the only person who was liable was the  
(b) amount of stock in the University of Chicago  
with the power of attorney. The University was liable to be  
owner of the mortgage and not the University. The  
high the person three months after the date of the original  
leave to the University to make the sale, and he was to  
change the mortgage with personal liability on the two mortgages  
which he received from the University and which had matured

January 15, 1933.

Among the various documents before the master were  
documents pertaining to the purchase of property through the  
estate, and a sale by a trustee of the property in question to  
the University under the terms of the deed, which provided that  
the University should deposit \$50,000, to be paid when the Chicago  
title and trust company was ready to purchase title to land,  
subject to mortgages of record and a \$50,000 second mortgage  
issued by the University. In addition the University had the authority  
to sell the property and to pay the mortgages;  
not to any liability of the University or to be paid on behalf of the  
University. The documents were signed by the University on January 15, 1933. It  
should appear that the University of Chicago, Illinois and  
William that the University had been given and that the  
a loan, and no effort was made to improve that fact, which  
still existed, however, to make the University a lender  
of money to that of a purchase from the University, and that to  
issues on the University which was not the same as which  
it was a trustee. The University presented its evidence that  
transaction constituted a liability as to the University.  
The law is well settled in this State that a loan to  
real estate made contemporaneously with a contract of sale  
shall not be shown to be a conveyance intended as a mortgage.

That doctrine was enunciated in the early case of Miller v. Thomas, 14 Ill. 428, and followed in the recent case of Illinois Trust Company v. Bibb, 328 Ill. 252, in which the court held that "where there is a conveyance by deed and a condition of defeasance in a collateral paper, any doubt whether the transaction is a mortgage will be resolved in favor of its character as a mortgage."

It is also the settled rule in this state that the assumption of existing mortgages by a grantee in a deed will not be presumed. A deed made "subject to" a mortgage does not alone render the grantee liable; there must be language of clear import that the grantee assumes the debt, it being generally held that the facts and intention are of controlling importance. In the case at bar the original option did not provide for an assumption and the supplement imposed no such obligation. The master found that there was no intention to hold Rafferty, let alone Benson who, the plaintiff says, was unknown to him, personally liable. In Wayne International Building and Loan Association v. Beckner, 191 Ind. 664, which was cited with approval in Buchsbaum v. Halper, 265 Ill. App. 226, the court said: "Obviously, the mere fact that the preliminary contract of sale provided that the grantee should 'assume' the mortgage, while the deed of conveyance evidencing the consummated contract recited only that the conveyance was 'subject to' the mortgage, would not prove that the grantee really had assumed and agreed to pay the mortgage. The execution of the deed of conveyance merged all previous negotiations with relation to what should be sold and conveyed. \*\*\* The conveyance of certain described lands 'subject to' a certain mortgage was merely the conveyance of an equity in those lands."

Plaintiff relies on Bride v. Stormer, 368 Ill. 524, as



that doctrine was established in the early case of Illinois v. Thompson, 12 Ill. 120, and followed in the recent case of Illinois v. Thompson, 12 Ill. 120, in which the court held that where there is a mortgage by deed and a condition of defeasance in a collateral paper, the mortgage is a mortgage and the condition is a condition, and the mortgage is not a mortgage in its character as a mortgage.

It is also the settled rule in this state that the assumption of existing mortgages by a grantor in a deed will not be presumed. A deed made "subject to" a mortgage does not alone render the grantor liable, there must be language of clear import that the grantor assumed the debt, it being generally held that the facts and intention are of controlling importance. In the case at bar the original option did not provide for an assumption and the assignment imposed no such obligation. The master found that there was no intention to hold adversely, let alone transfer the, the plaintiff says, was unknown to him, personally liable. In Boyle v. International Building and Loan Association v. Chicago, 121 Ill. 606, which was cited with approval in Boyle v. Chicago, 121 Ill. 606, the court said: "Adversely, the facts that the plaintiff's contract of sale provided that the grantor should assume the mortgage, while the deed of conveyance evidenced the continued contract related only that the conveyance was subject to the mortgage, would not prove that the grantor really had assumed and agreed to pay the mortgage. The execution of the deed of conveyance assigned all interests and relations with relation to that estate as sold and conveyed. The conveyance of certain described lands 'subject to' a certain mortgage was merely the conveyance of an equity in those lands."

supporting his contention that where real estate is purchased with the funds of one person and title is taken in the name of another, title will then be held by the party taking it, in trust, for the party furnishing the consideration. In that proceeding Stormer was an employee of the Denhart Bank for many years. In 1919 one Harland owned certain land and obtained a mortgage loan thereon from the bank of \$9,000. The loan was expressed in two notes, for \$5,000 and \$4,000 respectively, which the bank in turn sold to customers. Four years later the bank, through its trustee, foreclosed upon the mortgage, and after sale a master's deed was issued to Stormer in 1925. Stormer testified that he knew nothing about the title being placed in his name at that time. The bank paid the two notes of \$5,000 and \$4,000, respectively, to its customers. Subsequently, Stormer having become aware that he sold the title, at the request of the bank executed a trust deed and mortgage notes for \$12,000. These notes were sold by the bank to its customers and the bank, alone, received and retained the money. A controversy arose between the receiver and three of the stockholders as to who were the real parties in interest in making the loan. The Supreme court held that "the bank got and retained the money paid to it for notes, and, in equity, it is bound to pay whatever remains unpaid thereon after the sale of the mortgaged land" and held that there was unquestionably a resulting trust created the instant Stormer received title to the land, "and since the proof is that the bank's money was used in payment when Henry Denhart surrendered the certificate of indebtedness and receipted the master, it, and not the individual stockholders, was the person beneficially interested." However, in the more recent case of Naas v. Peters, 388 Ill. 505, the Supreme court in commenting on the Stormer case pointed out that "Stormer set up, in his own





behalf, a resulting trust and proved the same before the master," and held that the bank was bound to pay under the common counts for money had and received, on the theory that it, having sold the notes to a confiding public, could not be permitted to receive and retain money without being held accountable for it.

In this proceeding plaintiff lays considerable stress on the contract between Carlson and Benson, arguing that because it is in the form of a purchase and sale agreement, rather than in the form of a third mortgage for \$62,500, Benson adopted and ratified the contract and became the equitable assignee against his will or the intention of any of the parties for and in place of Rafferty. However, the primary question still remains whether Benson lent the money to Carlson, and in determining this question, the substance and intent takes precedence over the form. The master found and the decree provides that Benson had not by deed or otherwise assumed or agreed to pay the mortgages, that there was no agreement, express or implied, on Benson's part to do so, that the extension agreement executed by Benson contained no language which could reasonably be construed to show any express or implied agreement on his part to pay the mortgage, and that there was no evidence of any intention on the part of Hennessey to hold Benson liable for the payment of any part of the mortgages until the filing of this suit; and the record supports these conclusions, it being apparent that Carlson and Benson chose a deed and contract as the evidence of the loan and security, instead of a mortgage, in order to avoid the cost and delay of foreclosing a third mortgage representing little value and security, and also because it would have been difficult to provide in a third mortgage that



...and proved the same before the  
...and held that the bank was bound to pay under the  
...on the theory that  
...it, having said the bank is a continuing business, could not  
...be permitted to receive the same amount without being held  
...responsible for it.

In this proceeding plaintiff has submitted evidence  
on the contract between plaintiff and defendant, showing that  
because it is in the form of a purchase and sale agreement,  
rather than in the form of a third mortgage for \$10,000,  
which would have entitled the plaintiff to the same  
...of the parties for and in favor of plaintiff. However, the  
primary question still remains whether or not the bank  
to plaintiff, and in determining this question, the evidence  
and that the mortgage was not paid. The master found  
and the master found that the bank was not to be held as a  
...also seemed to intend to pay the mortgage, that there was  
no agreement, express or implied, on plaintiff's part to pay  
that the statement of account submitted by plaintiff constituted no  
...plaintiff which could possibly be considered to their  
...of plaintiff's agreement on his part to pay the mortgage,  
and that there was no evidence of any intention on the part  
of defendant to hold plaintiff liable for the payment of the  
part of the mortgage which was not paid; and the  
record supports these conclusions. It is also apparent that  
plaintiff and defendant entered into a contract as the evidence  
of the loan and mortgage, instead of a mortgage, in which to  
...the cost and duty of purchasing a third mortgage  
representing little value and security, and also because it  
could have been obtained in a third mortgage.

Carlson pledge his Orrington Hotel stock and insurance policies. Judging the transaction as a whole, Benson's deed was in the nature of a mortgage. His title did not give him, at any time, the usual rights and incidents of ownership. He had to hold the property until he could demand his money from Carlson, if the latter did not voluntarily pay it at the expiration of three years; and not until there was a default could he resort to the land or any of the other securities. This indicates an intent to create a loan relationship, and under the authorities, it should be given such effect.

In an exhaustive brief of 73 pages plaintiff raises and discusses various theories and propositions, but on oral argument it was conceded that the only question involved was whether Benson should be personally liable for any deficiency that might result from the sale, and upon a careful consideration of this question and for the reasons indicated, we are of opinion that the master and court properly held adversely to plaintiff. The decree of the Superior court is therefore affirmed.

DECREE AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.



Christian (Lutheran) and his wife and children  
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42833

DR. ARNOLD SCHLEIFER,  
Appellant,

v.

DEPARTMENT OF REGISTRATION  
AND EDUCATION OF THE STATE  
OF ILLINOIS, and others,  
Appellees.

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

3263.A.259<sup>2</sup>

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The petitioner, Dr. Arnold Schleifer, brought an action in mandamus to compel Frank G. Thompson as director, and Philip M. Harman as superintendent, of the Department of Registration and Education of Illinois, to grant him access to the examination of candidates for licenses to practise medicine in all its branches. Pursuant to a hearing the court entered an order denying the petition and this appeal followed.

Relator's petition alleged that he was a resident of Illinois, 28 years of age, a person of good moral character; that on June 1, 1942 he completed a twelve-month internship in the Alexian Brothers Hospital in Chicago; that he had made a declaration of intention to become a citizen of the United States October 9, 1941 and received a certificate of declaration which he was ready to produce in open court; that he had the preliminary and professional education required by the Medical Practice Act of this state (Ill. Rev. Stat. 1943, ch. 91, sec. 5b), having graduated from the medical school of the University of Vienna in Vienna, Austria, which in the judgment of the Department of Registration and Education was reputable and in good standing on March 4, 1938, when he received the degree of doctor of universal medicine, and continued so to be during 1939,



43833

MR. ALBERT SCHWARTZ,  
Appellant.

DEPARTMENT OF REGISTRATION  
AND LICENSING OF THE STATE  
OF ILLINOIS, and others,  
Respondents.

WRIT OF HABEAS CORPUS.

NOV. 1933

336 P.A. 258

MR. JUSTICE TOWNSEND delivered the opinion of the court.

The petitioner, Dr. Albert Schwartz, brought an action in mandamus to compel Frank G. Thompson as director, and Philip J. Brown as superintendent, of the Department of Registration and Licensing of Illinois, to grant him access to the examination of candidates for license to practice medicine in all its branches. Pursuant to a hearing the court entered an order denying the petition and this appeal followed.

Petitioner's petition alleged that he was a resident of Illinois, 35 years of age, a person of good moral character; that on June 1, 1941 he completed a twelve-month internship in the Alexian Brothers Hospital in Chicago; that he had made a declaration of intention to become a citizen of the United States October 9, 1941 and received a certificate of declaration which he was ready to produce in open court; that he had the preliminary and professional education required by the Medical Practice Act of this State (Ill. Rev. Stat. 1941, ch. 91, sec. 15), having graduated from the medical school of the University of Vienna in Vienna, Austria, which in the judgment of the Department of Registration and Licensing was reputable and in good standing on March 4, 1938, when he received the degree of doctor of universal medicine, and continued so to be during 1939.

1940 and until February 21, 1941, at which time the department passed a resolution, effective that same date, suspending recognition of all medical schools, except those in the United States and Canada, until such date as the suspended schools should ask for reinstatement and submit to a personal investigation; that the University of Vienna, at the time of petitioner's entrance therein and likewise at the time of his graduation therefrom, required as a prerequisite to admission thereto a two-year course of instruction in a college of liberal arts or its equivalent; that petitioner submitted to the aforesaid university, and again tenders as evidence of his two-year course of such instruction, the graduation certificate received by him June 25, 1932 from Real-gymnasium of Protestant (Reformed) Faith of Miskolc, Hungary; that he attended ten full courses or semesters (five years) of medical lectures in the treatment of human ailments at the medical school of the University of Vienna, each year's instruction consisting of not less than nine months; that he began his medical course on October 1, 1932 and finished his studies about March 4, 1938, more than 40 months having elapsed from the time of his enrollment to the completion of his medical studies; that the courses of instruction in preliminary and medical studies sufficiently complied with the requirements of the Illinois Medical Practice Act and are satisfactory to the department, and that in fact the department had admitted to examination a classmate of petitioner who likewise received his medical degree from the University of Vienna on March 4, 1938, being the same day on which petitioner graduated from the medical school; that the department admits the University of Vienna medical school was reputable and in good standing March 4, 1938, when petitioner graduated and received his



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tioner's entrance therein and likewise at the time of his  
graduation therefrom, required as a prerequisite to admission  
thereto a two-year course of instruction in a college of  
liberal arts or its equivalent; that petitioner submitted to  
the Austrian University, and within ten days a certificate of his  
two-year course of such instruction, the graduation certifi-  
cate received by him June 15, 1938, from the University of  
Protestant (Reformed) Church of Illinois, Chicago, that he  
attended ten full courses or semesters (five years) of medical  
lectures in the treatment of human ailments at the medical  
school of the University of Vienna, each year's instruction  
consisting of not less than nine months; that he began his  
medical course on October 1, 1932 and finished his studies  
about March 4, 1938, more than 40 months having elapsed from  
the time of his enrollment to the completion of his medical  
studies; that the course of instruction in physiology and  
medical studies sufficiently complied with the requirements  
of the Illinois Medical Practice Act and are satisfactory to  
the department, and that in fact the department had admitted  
to examination a certificate of petitioner who likewise received  
his medical degree from the University of Vienna on March 4,  
1938, being the same day on which petitioner graduated from  
the medical school; that the department admits the University  
of Vienna medical school was reputable and in good standing  
March 4, 1938, when petitioner graduated and received his

degree, and continued to be so during all of 1939 and 1940 and up to February 21, 1941, long after petitioner had completed his education in that institution; that the American Medical Association still found, as of December 21, 1942 (the date the petition was filed), said school to be reputable and in good standing; that although he has met all the requirements of the act and of the department, nevertheless the superintendent refuses to admit him to an examination on the ground that graduates of medical colleges in continental Europe after July 1, 1936 are not eligible for licensure in Illinois at the present time under the rule passed February 21, 1941 and amended June 2, 1942; that the foregoing rules and regulations are unreasonable and arbitrary, and that since he has exhausted all legal means available to be admitted to the examination, the writ of mandamus ought to be awarded to him.

The respondents' answer admitted substantially all the material allegations of the petition, denying only that the University of Vienna was a reputable school and in good standing on March 4, 1938, and during the period of 1939-1940 and up to February 21, 1941, in the judgment of the department, when the foregoing rules and regulations were enacted, and they aver that it was within the power of the department, as provided in the act, to adopt the rules, and contend that the rules were fair and reasonable.

Respondents concede that the courts may review rules of the department to determine whether they are fair, reasonable and impartial. In the recent case of People v. Frank G. Thompson et al., 325 Ill. App. 95, we had occasion to review the decisions so holding, and they need not be repeated here. Petitioner's principal contention is that the rule discrediting



degrees, and continued to be so during all of 1943 and 1944  
and up to February 21, 1945, when after petitioner had  
completed his education in that institution; that the  
American Political Association still found, as of December 31,  
1944 (the date the petition was filed), said school to be  
reputable and in good standing; that although it was not all  
the requirements of the act and of the department, nevertheless  
least the superintendent refused to admit him to an examina-  
tion on the ground that graduates of medical colleges in  
continental Europe after July 1, 1939 are not eligible for  
licensure in Illinois at the present time under the rule  
passed February 15, 1941 and amended June 2, 1944; that the  
foreign rules and regulations are unreasonable and arbi-  
trary, and that since he has obtained all local means avail-  
able to be admitted to the examination, the will of mandamus  
ought to be granted to him.

The respondents, under admitted substantially all the  
material allegations of the petition, denying only that the  
University of Vienna was a reputable school and in good  
standing on March 4, 1941, and during the period of 1939-1940  
and up to February 21, 1941, in the judgment of the depart-  
ment, when the foreign rules and regulations were enacted,  
and they aver that it was within the power of the department,  
as provided in the act, to adopt the rules, and contend that  
the rules were fair and reasonable.

Respondents contend that the board may revise rules  
of the department to determine whether they are fair, reason-  
able and lawful. In the recent case of People v. Frank B.  
Thompson et al., 305 Ill. App. 2d, we had occasion to review  
the decision so holding, and they need not be repeated here.  
Petitioner's principal contention is that the rule disqualifying

European schools was intrinsicly unreasonable, even apart from its retrospective aspect.

Respondents take the position that as the war went on, "the social disintegration which accompanies the advance of fascism had appeared in Central Europe and attacked its cultural institutions long before the commencement of actual hostilities in 1939," and that by reason thereof the department set as the effective date for the new rule July 1, 1936, upon the theory that it was deprived of the power to investigate the school after war had commenced. While it may be conceded that after Germany had seized Austria, proper investigation would be impossible, there is nothing in the record to indicate full means of investigation were impossible prior to March 1938. Petitioner graduated March 4, 1938, and until that time the situation in Austria did not preclude or prevent an investigation of the University of Vienna. The department having recognized that university as reputable and in good standing March 4, 1938, it would seem to us to be an arbitrary exercise of power to suspend, four years later, recognition of an institution which had theretofore been generally accepted by the department as a school in good standing.

Petitioner's testimony was the only evidence adduced upon the hearing. He testified that he had attended the University of Vienna from October 1932 to 1938; that it was a recognized school of learning not only in his native country but was also fully recognized as a grade A school in the United States, approved by the American Medical Association; that at the time of his graduation there had been no change whatever in the school, the professors, the curriculum and the system were exactly the same as they had been for some



European schools was intrinsically unreasonable, even apart from its retrospective aspect.

Respondents take the position that as the war went on, "the social disintegration which accompanied the advance of

fascism had appeared in Central Europe and affected its cultural institutions long before the commencement of actual hostilities in 1914," and that by reason thereof the department set as the effective date for the new rule July 1, 1936, upon the theory that it was deprived of the power to investigate the school after war had commenced. While it may be conceded

that after Germany had seized Austria, proper investigation would be impossible, there is nothing in the record to indicate

full means of investigation were impossible prior to March 1938. Petitioner submitted March 4, 1938, and until that time the situation in Austria did not preclude or prevent an investigation of the University of Vienna. The department having

recognized that university as reputable and in good standing March 4, 1938, it would seem to us to be an arbitrary exercise of power to suspend, four years later, recognition of an institution which had theretofore been generally accepted by the department as a school in good standing.

Petitioner's testimony was the only evidence adduced

upon the hearing. He testified that he had attended the University of Vienna from October 1935 to 1936; that it was a recognized school of learning not only in his native country

but was also fully recognized as a grade school in the United States, approved by the American Medical Association; that at the time of his graduation there had been no change whatever in the school, the professors, the curriculum and the system were exactly the same as they had been for some

20 or 25 years; that Germany did not seize Austria until after his graduation and after he had received his diploma; that one of the students who graduated from the University of Vienna on the same day as petitioner was admitted to the examination in 1940 and is at present a licensed physician in the State of Illinois; that at the time of petitioner's application to the department for admission to the examination he submitted his credentials, work book and other records, which the committee examined; and that the only reason for the refusal of the department to grant him access to the examination was the rule heretofore set forth.

Under the circumstances it would appear that in order to become licensed to practise medicine in this state, petitioner would have to repeat an entire medical course of four years in a school recognized by the department because of the rules and regulations promulgated. It seems to us that, under the existing circumstances, this renders the rules unreasonable and arbitrary, and for the reasons indicated we are of opinion that the writ of mandamus should have been granted. The order denying the petition is therefore reversed and the cause remanded with instructions to issue the writ as prayed.

ORDER REVERSED AND CAUSE  
REMANDED WITH INSTRUCTIONS.

Sullivan, P. J., and Scanlan, J., concur.



On or about May 1940, [redacted] was admitted to the University of Wisconsin at Madison as a petitioner and admitted to the examination in 1940 and he received a license to practice in the State of Illinois; that at the time of petitioner's application to the Department for admission to the examination he submitted his credentials, work book and other records, which the committee examined and that the only reason for the refusal of the department to grant him access to the examination was the rule heretofore set forth.

From the circumstances it would appear that in order to become licensed to practice medicine in this state, petitioners would have to repeat an entire medical course of four years in a school recognized by the department because of the rules and regulations promulgated. It seems to us that, under the existing circumstances, this renders the rules unreasonable and arbitrary, and for the reasons indicated we are of opinion that the writ of habeas corpus should have been granted. The order denying the petition is therefore reversed and the case remanded with instructions to issue the writ as prayed.

THE U. S. DEPARTMENT OF THE INTERIOR  
BUREAU OF LAND MANAGEMENT

... ..

43193

IN THE MATTER OF THE  
ESTATE OF NICHOLAS KEISER,  
DECEASED.

317 A  
APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

326 I.A. 260

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Nicholas Keiser died intestate in November 1936, leaving him surviving his six sons and daughters, Nicholas, Jr., John Joseph and George Keiser, Susan Madsker, Barbara Salefsky and Virginia Cieszynski. Following his death no immediate application was made for letters of administration. March 3, 1938, one of his sons, George Keiser, died intestate, leaving him surviving Bessie Keiser, his widow, and five minor daughters aged 6 to 16. George had a safety deposit box in the Continental Illinois National Bank of Chicago which upon his death was found to contain \$2,293 in cash, five \$1,000 Chicago, Milwaukee, St. Paul and Pacific Railway bonds dated February 2, 1925, a \$1,000 Kentucky Utilities Company first mortgage gold bond dated February 1, 1926, a certificate for 12 shares capital stock of Commonwealth Edison Company dated October 13, 1937, a certificate for 20 shares common stock of Atchison, Topeka & Santa Fe Railway Company dated August 4, 1928, a certificate for 10 shares common stock of Atchison, Topeka & Santa Fe Railway Company dated March 4, 1932, and a participation certificate for 5 trust shares of the Randolph Hotel Company dated January 7, 1937, all registered in the name of George Keiser.

March 5, 1938, two days after George Keiser's death, his brother, John Joseph Keiser, with the consent of the other heirs of his father, applied to the Probate court for letters of administration of the estate of Nicholas Keiser, and was accordingly appointed administrator. Subsequently, March 11, 1938, the



IN THE CIRCUIT COURT OF THE JUDICIAL DISTRICT OF KANSAS, IN AND FOR THE COUNTY OF OSAGE.

IN THE MATTER OF THE ESTATE OF GEORGE KEISER, DECEASED.

3881A.260

MR. JUSTICE WILLIAM F. BROWN, JR., CLERK OF THE COURT.

Nicholas Kaiser died intestate in November 1936, leaving him surviving his son and daughter, Nicholas, Jr., John Joseph and George Kaiser, Susan Kaiser, Mary Kaiser and Virginia Kaiser. Following his death no immediate application was made for letters of administration. March 3, 1938, one of his sons, George Kaiser, died intestate, leaving him surviving his wife, his widow, and five minor daughters aged 6 to 16. George had a safety deposit box in the Continental Illinois National Bank of Chicago which upon his death was found to contain \$2,293 in cash, five \$1,000 Chicago, Milwaukee, St. Paul and Pacific Railway bonds dated February 2, 1925, a \$1,000 Kentucky Utilities Company first mortgage gold bond dated February 1, 1926, a certificate for 10 shares capital stock of Commonwealth Edison Company dated October 15, 1937, a certificate for 20 shares common stock of American Telephone & Telegraph Company dated August 4, 1932, a certificate for 10 shares common stock of American Telephone & Telegraph Company dated March 4, 1932, and a participation certificate for 5 shares of the Washington Hotel Company dated January 7, 1937, all registered in the name of George Kaiser. March 7, 1938, two days after George Kaiser's death, his brother, John Joseph Kaiser, with the consent of the other heirs of his father, applied to the Probate Court for letters of administration of the estate of Nicholas Kaiser, and was accordingly appointed administrator. Subsequently, March 11, 1938, the

Probate court appointed Bessie Keiser as administratrix of the estate of George Keiser, deceased. It appears that the brothers and sisters of George Keiser, acting on information that their brother George had taken possession of the assets of his father's estate and misappropriated funds and property belonging thereto, called a conference of all the children and heirs of Nicholas Keiser, which was held in the forepart of March 1938, shortly after George's death. David A. Riskind, an attorney representing the estate of Nicholas Keiser, deceased, Bessie Keiser, administratrix of the estate of George Keiser, and her attorney, John H. Buck, were also present at the conference. Mr. Riskind and several of the Nicholas Keiser heirs there charged that George, during his lifetime, had appropriated assets belonging to his father consisting of cash and securities worth approximately \$5,000, which they said were contained in George's safety deposit box in the Continental Illinois National Bank. It is claimed by the appellant, John Joseph Keiser, administrator of his father's estate, that Bessie Keiser, purporting to be familiar with George's business affairs, admitted that her husband had misappropriated funds belonging to his father and that she had agreed at the conference to turn over the assets in her husband's safety deposit box to the administrator of the estate of Nicholas Keiser.

Thereafter, March 28, 1938, John Joseph Keiser filed a petition in the Probate court repeating the accusations made at the foregoing conference, alleging that Bessie Keiser had admitted the defalcations of her husband and had agreed to turn over the funds so taken to the administrator of Nicholas Keiser's estate, and asking the consent of the Probate court thereto. An order was accordingly entered directing her to deliver the assets in her husband's safety deposit box, to



probate court appointed as administrator of the estate of George Kaiser, deceased. It appears that the probate and return of George Kaiser, acting on information that their common daughter had taken possession of the assets of his father's estate and misappropriated funds and property belonging thereto, called a conference of all the children and heirs of Nicholas Kaiser, which was held in the town of March 1935, shortly after George's death. David A. Kaiser, an attorney representing the estate of Nicholas Kaiser, deceased, preside Kaiser, administrator of the estate of George Kaiser, and his attorney, John A. King, were also present at the conference. Mr. Kaiser and several of the Nicholas Kaiser heirs there charged that George, during his lifetime, had appropriated assets belonging to his father consisting of cash and securities worth approximately \$5000, which they said were contained in George's safety deposit box in the Continental Illinois National Bank. It is claimed by the applicant, John Joseph Kaiser, administrator of his father's estate, that Rosalie Kaiser, purporting to be a child of George's business affairs, claimed that her husband had misappropriated funds belonging to his father and that she had agreed to the reference to turn over the assets in her husband's safety deposit box to the administrator of the estate of Nicholas Kaiser. Thereafter, March 20, 1935, John Joseph Kaiser filed a petition in the probate court requesting the court to make at the foregoing conference, claiming that Rosalie Kaiser had admitted the defalcations of her husband and had agreed to turn over the funds so taken to the administrator of Nicholas Kaiser's estate, and asking the consent of the probate court thereto. An order was accordingly entered directing her to deliver the assets in her husband's safety deposit box to

be held until further order of the court, and a guardian ad litem was ordered to be appointed to represent the five minor heirs of George Keiser, deceased. No guardian was appointed at the time, but subsequently, March 24, 1942, Bessie Keiser, as administratrix, filed a petition in the Probate court charging that the agreement to turn over assets was obtained by threats, fraud and duress, asking that the agreed order of January 15, 1942 finding against the guardian, be vacated, stating that the final account and report of John Joseph Keiser, as administrator of his father's estate, which had theretofore been entered and approved by the Probate court, had been vacated February 26, 1942 on petitioner's motion, and asking that a hearing on its merits be had on the ownership of the items taken from the safety deposit box.

When the matter came up for hearing December 15, 1942 before Judge O'Connell of the Probate court, an order was entered finding that no guardian ad litem had ever been appointed to represent the minor heirs of George Keiser, deceased, as provided for by the order of March 28, 1938, and the court then named Edward F. O'Toole as guardian ad litem for George Keiser's minor children. At the same time the guardian and Bessie Keiser, as administratrix of George Keiser's estate, were given leave to file instanter their answers to the petition of March 28, 1938, and the matter was set down for hearing.

May 21, 1943 an order was entered in the Probate court ordering that the agreement set forth in the petition of John Joseph Keiser, administrator, which had been filed March 28, 1938, be approved, and that two minor items appearing in his final account as administrator, be disallowed, finding that Bessie Keiser had been guilty of



be held until the next order of the court, and a guardian  
ad litem was ordered to be appointed to represent the five  
minor heirs of George Kaiser, deceased. The guardian was  
appointed at the time, and subsequently, on March 28, 1943,  
Bessie Kaiser, an administratrix, filed a petition in the  
Probate Court claiming that the same one of them over  
cassette was obtained by threats, fraud and undue influence,  
that the agreed order of January 1, 1942 finding against  
the guardian, be vacated, stating that the final account  
and report of John Joseph Kaiser, as administrator of his  
father's estate, which had theretofore been entered and  
approved by the Probate Court, had been vacated February 26,  
1943 on Bessie Kaiser's motion, and asking that a hearing on  
its merits be had on the ownership of the same when filed  
the Probate Court.

When the matter came up for hearing December 11, 1943  
before Judge O'Donnell of the Probate Court, an order was  
entered finding that no guardian ad litem had ever been  
appointed to represent the minor heirs of George Kaiser,  
deceased, as provided for by the order of March 28, 1943,  
and the court then named Edward E. Doyle as guardian ad  
litem for George Kaiser's minor children. At the same time  
the guardian and Bessie Kaiser, as administratrix of George  
Kaiser's estate, were given leave to file answers to their  
answers to the petition of March 28, 1943, and the matter  
was set down for hearing.

May 21, 1943 an order was entered in the Probate Court  
ordering that the agreement set forth in the petition of  
John Joseph Kaiser, administrator, which had been filed  
March 28, 1943, be approved, and that two minor heirs  
appearing in his final account as administrator, be dis-  
allowed, finding that Bessie Kaiser had been guilty of

laches in her petition of March 24, 1942, and holding that she was entitled to receive, as administratrix of the estate of her husband, the sum of \$610.33, an item which is not involved in this litigation.

Bessie Keiser took an appeal from that order to the Circuit court, where the case was tried de novo on March 15, 1944. It was agreed between counsel for the respective parties that the only issue before the Circuit court was whether or not the assets in the safety deposit box of George Keiser, deceased, belonged to the estate of Nicholas Keiser, deceased, or to that of his son George. Edward F. O'Toole was again appointed guardian ad litem to represent the minor children of George Keiser, and he filed his appearance and answer. Upon the hearing John Joseph Keiser and his two sisters, Virginia and Susan, and their attorney all repeated the general accusations that George Keiser had misappropriated assets of his father's estate and that George had been handling his father's affairs for many years, but no one testified to any particular business transactions which George had handled or negotiated for his father, or as to any specific assets which he had misappropriated. Susan made a general statement that her father had \$20,000 when he died, and said that George took care of it subsequent to her father's death, but she did not know how much he had in cash or stocks or give any particulars as to his assets. When another sister, Virginia, testified that her father had left stocks and securities, the court made the following pertinent inquiry: "Don't you think we ought to find out how much, where it was, what it consisted of; if he left some stocks, what they were, and so forth? Then we have at least some idea"; but no attempt was made to follow the court's suggested inquiry,



laches in her petition of March 11, 1943, and holding that she was entitled to recovery, an acknowledgment of her estate of her husband, the sum of \$100.00, an item which is not involved in this litigation.

Heckie Kaiser took an appeal from that order to the Circuit Court, where the case was tried de novo on March 11, 1944. It was argued between counsel for the responsive parties that the only issue before the Circuit Court was whether or not the assets in the subject deposit were of George Kaiser, deceased, belonging to the estate of George Kaiser, deceased, or to that of his son George. Whereupon the Court again appointed a guardian ad litem to represent the minor children of George Kaiser, and he filed his answer and answer. Upon the hearing from Joseph Kaiser and his two sisters, Virginia and Susan, and their attorney all reported the formal questions that George Kaiser had asked and reported assets of his father's estate and that George had been handling his father's affairs for many years, but no one testified to any particular business transactions which George had handled or negotiated for his father, or as to any assets which he had appropriated. Susan made a general statement that her father had \$20,000 when he died, and said that George took care of the settlement to her father's death, but she did not know how much he had in cash or stocks or five any possessions as to his assets. When another sister, Virginia, testified that her father had left stocks and securities, the Court made the following pertinent inquiry: "Don't you think we want to find out how much, where it was, what it consisted of; if he left some stocks, what they were, and so forth? Then we have at least some idea"; but no attempt was made to follow the Court's suggested inquiry.

and no detailed evidence was introduced on that subject. The parties stipulated that at the time Nicholas Keiser died he had a bank account in the sum of \$2,406.37. It is suggested, but not argued, by the Nicholas Keiser children that the bank book evidencing this account was found in George's possession after his death, but the record discloses that it was found in the closet of a bedroom which George had used when he slept at his deceased father's home instead of his own, and no testimony was given that George had made any deposits or withdrawals from that account. It appears from the testimony of John Joseph Keiser that he lived with his father up to the time of his death; that his father had not been employed subsequent to 1927 or 1928; that he was last employed by the Illinois Central Railroad as a common laborer, and before that he worked for Dolese<sup>&</sup> Shepard, first as a digger in the quarry and later as a stationary fireman at a salary of \$200 a month.

As against this evidence Bessie Keiser testified that her husband George had been buying stocks and bonds since 1915, and that in some years he turned over as much as \$15,000 of business; that some of the brokers with whom he did business were S. B. Chapin and Company, Winthrop and Harris, and James R. Oliphant and Company; and that he had been employed on the Belt Railroad for about 30 years as a railroad car inspector.

Testifying on behalf of Bessie Keiser, administratrix, Fred M. Baxter, assistant secretary of the Public Service Company of Northern Illinois, stated that his concern had issued four stock certificates for one share each in the name of George Keiser in 1931 and 1932, and that they were later, in 1934, canceled by the issuance of a new certificate for four shares of common stock, also in the name of George Keiser.



and as detailed evidence was introduced on that subject, the parties stipulated that at the time of the murder, the deceased had a bank account in the sum of \$2,500.00. It is suggested, but not argued, by the witnesses, that the bank book evidencing this account was found in George's possession after his death, but the record discloses that it was found in the closet of a bedroom which George had used when he slept at his deceased father's home, husband of his son, and no testimony was given that George had made any deposits or withdrawals from that account. It appears from the testimony of John Joseph Keiser that he lived with his father up to the time of his death; that his father had not been employed subsequent to 1917 or 1918; that he was last employed by the Illinois Central Railroad as a common laborer, and before that he worked for Joseph & Shepard, first as a driver in the quarry and later as a stationary engineer at a salary of \$200 a month. As against this evidence, the State presented that her husband George had been paying stock and bonds since 1917 and that in some years he turned over as much as \$1,000 of business; that some of the brokers with whom he did business were J. E. Chapin and Company, Anthony and Davis, and James H. Alphant and Company; and that he had been employed on the Santa Fe Railroad for about 30 years as a railroad car inspector. Testimony on behalf of the State further, that Fred W. Barker, assistant secretary of the Pacific Service Company of Northern Illinois, stated that his concern had issued four stock certificates for one share each in the name of George Keiser in 1931 and 1932, and that they were later, in 1934, cancelled by the issuance of a new certificate for four shares of common stock, also in the name of George Keiser.

Chester B. Swan, stock transfer agent for the Commonwealth Edison Company, testified that in October 1937 four shares of Public Service Company of Northern Illinois were turned in, and in lieu thereof 12 shares of stock of the Commonwealth Edison Company were issued in the name of George Keiser.

James F. Smith, one of the partners in S. B. Chapin and Company, disclosed that it had had an account for George Keiser, that he had bought and sold bonds of the Chicago, Milwaukee, St. Paul and Pacific Railway Company from June 5, 1931 to April 28, 1932, and that S. B. Chapin and Company had on April 28, 1932 delivered to George Keiser \$5,000 of bonds of the Chicago, Milwaukee, St. Paul and Pacific Railway Company.

Herbert H. Kant, vice president of Greenebaum Investment Company, was also called to testify on behalf of Bessie Keiser, administratrix; and while on the stand, the attorneys for the respective parties stipulated that on January 6, 1926 Greenebaum Sons Investment Company sold a bond of the Eitel Building to George Keiser which on January 7, 1937 was exchanged by him for a participation certificate for 5 shares of the Randolph Hotel Company. Substantially all the foregoing bond and stock transactions occurred long before the date of Nicholas Keiser's death.

In the course of the hearing in the Circuit court the parties stipulated that John Joseph Keiser, as administrator, had sold all the securities involved under an order of the Probate court for the sum of \$2,481.43 which, together with the cash that was found in the box in the sum of \$2,293, constituted a total of \$4,774.43.

As ground for reversal John Joseph Keiser, the administrator of his father's estate, now argues that Bessie Keiser,



Charles H. ... stock transfer agent for the ...  
wealthy ... company, testified that in October 1937 ...  
shares of ... company of ... Illinois were  
turned in, and in their stead 12 shares of stock of the  
Commonwealth Edison Company were issued in the name of  
George Kaiser.

James H. ... one of the partners in ...  
and company, testified that it had had an account for  
George Kaiser, that he had bought and sold bonds of the  
Chicago, Milwaukee, St. Paul and Pacific Railway Company  
from June 5, 1931 to April 23, 1932, and that ...  
and company had on April 23, 1932 delivered to George Kaiser  
\$5,000 of bonds of the Chicago, Milwaukee, St. Paul and  
Pacific Railway Company.

Robert H. ... vice president of Greenbaum Investment  
Company, was also called to testify on behalf of George Kaiser,  
admitting that while on the staff, the company for the  
respective parties stipulated that on January 6, 1932 Green-  
baum Investment Company sold a bond of the ...  
to George Kaiser when on January 7, 1932 was exchanged by  
him for a participation certificate for 7 shares of the  
Vandalia Hotel Company. Substantially all the foregoing bond  
and stock transactions occurred long before the date of  
Nicholas Kaiser's death.

In the course of the hearing in the ... court the  
parties stipulated that John Joseph Kaiser, an administrator,  
had sold all the securities involved under an order of the  
Probate Court for the sum of \$2,581.43 which, together with  
the cash that was found in the box in the sum of \$2,581.43,  
constituted a total of \$5,162.86.

A ground for reversal John Joseph Kaiser, the adminis-  
trator of his father's estate, now argues that George Kaiser,

administratrix of her husband's estate, was guilty of laches, that she failed to prove duress, and that she adopted the wrong procedure in the Probate court by coming in on petition, as she did, instead of resorting to a citation proceeding, as provided in sections 335-338 of chapter 3, Ill. Rev. Stat. 1943. From a careful examination of the record, it clearly appears that none of these issues was submitted to the Circuit court either by appropriate pleadings or evidence touching upon the subject matter of the defenses, but that the parties expressly stated that the only issue before the court involved the ownership of the bonds, stocks, securities and cash found in George Keiser's safety deposit box after his death. Therefore the only question before the court was as to which of the two estates owned the disputed assets. The courts of this state have repeatedly held that a point not raised on trial cannot be urged on appeal (Oliver v. Retirement Board, etc., 311 Ill. App. 38, Quinlan & Tyson, Inc. v. National Casualty Company, 311 Ill. App. 369), and that a case cannot be tried on one theory in the trial court and on another theory in the reviewing court. (Clerken v. Cohen, 315 Ill. App. 222, Kinne et al. v. Duncan et al., 315 Ill. 577, Off et al. v. The Exposition Coaster, Inc., et al., 336 Ill. 100.) Therefore, the question presented is whether the evidence supports the finding and judgment of the Circuit court that the disputed assets belonged to the estate of George Keiser, deceased. As heretofore indicated, the proof adduced by the administrator of the estate of Nicholas Keiser was extremely vague. Except for the specific statement that the bank account consisted of \$2,406.37, the testimony of the witnesses was generally to the effect that Nicholas Keiser had considerable assets.



admission of her husband's estate, and that she adopted the  
that she failed to prove, and that she adopted the  
from procedure in the estate case by coming in on part-  
tion, as she did, instead of as a party to a partition proceeding.  
ing, as provided in sections 332-333 of chapter 5, Ill. Rev.  
stat. 1903. From a careful examination of the record, it  
clearly appears that none of these facts was submitted to  
the circuit court either by appropriate pleadings or evidence  
touching upon the subject matter of the defense, and that  
the parties expressly stated that the only issue before the  
court involved the ownership of the bonds, stocks, securities  
and cash found in George Kaiser's safety deposit box after  
his death. Therefore the only question before the court was  
as to which of the two estates owned the disputed assets.  
The courts of this state have repeatedly held that a point  
not raised on trial cannot be urged on appeal (Oliver v.  
Lebanon Trust Co., 211 Ill. 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000).  
and on another theory in the reviewing court. (Oliver v.  
Lebanon Trust Co., 211 Ill. 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000).  
the estate of George Kaiser, deceased. Therefore,  
indicated, the proof adduced by the administrator of the  
estate of Nicholas Kaiser was entirely vague. Except for  
the specific statement that the bank account consisted of  
\$2,400.32, the testimony of the witnesses was generally to  
the effect that Nicholas Kaiser had considerable assets.

The court was evidently not satisfied with the probative value of the testimony and suggested to one of the daughters that some effort ought to be made to prove in detail the nature and extent of Nicholas Keiser's assets, but no such evidence was forthcoming. Indeed, except for the bank account, there is no evidence showing a single item or asset belonging to Nicholas Keiser. After the court had suggested that some detailed proof be introduced as to the assets possessed by Nicholas Keiser prior to his death the case was adjourned for two weeks, and Bessie Keiser then adduced the affirmative proof hereinbefore summarized with respect to the stock and bond transactions of her husband over a period of many years, prior to the death of his father, Nicholas. In the absence of any convincing proof that George Keiser had been guilty of the misappropriations, we think the evidence adduced by his widow abundantly sustains the chancellor's finding and judgment.

Both parties argue the question of laches. We find no such plea of record, and no evidence was introduced upon the subject. The children of George Keiser, deceased, have a two-thirds interest in the disputed assets, and even if the plea had been interposed, they should not be deprived of their rights on the ground of laches under the circumstances of this proceeding. On the face of the record a period of approximately four years elapsed between the filing of the petition and the hearing, but the administrator of the estate of Nicholas Keiser is responsible for much of the delay. When the petition was first presented to the Probate court in 1938, an order was entered for the appointment of a guardian ad litem to represent the five minor children. The administrator took



The court was evidently not satisfied with the probative value of the testimony and resorted to one of the last means that some effort ought to be made to prove in detail the nature and extent of Nicholas Kaiser's assets, but no such evidence was forthcoming. Indeed, except for the bank account, there is no evidence showing a single item or asset belonging to Nicholas Kaiser. The court had suggested that some detailed proof be introduced as to the assets possessed by Nicholas Kaiser prior to his death. The case was adjourned for two weeks, and Nicholas Kaiser then introduced the affirmative proof hereinbefore submitted with regard to his stock and bond transactions of his husband over a period of many years, prior to the death of his father, Nicholas. In the absence of any convincing proof that George Kaiser had been guilty of the misappropriations, we think the evidence adduced by his wife, abundantly sustains the above stated finding and judgment.

Both parties agree the question of law is, the finding no such plea of record, and no evidence was introduced upon the subject. The children of George Kaiser, deceased, have a two-thirds interest in the disputed assets, and even if the plea had been introduced, they should not be deprived of their rights on the ground of law when the circumstances of this proceeding, on the face of the record, a matter of common knowledge, fully placed between the filing of the petition and the hearing, but the administration of the estate of Nicholas Kaiser is responsible for each of the delays. When the petition was first presented to the Probate Court in 1915, an order was entered for the appointment of a guardian ad litem to represent the five minor children. The administration took

no steps to bring about the appointment or to press the matter for hearing, and it was not until December 15, 1942 that a guardian was appointed, on motion of Bessie Keiser, administratrix of her husband's estate, and the petition of March 28, 1938 was then set for trial.

Upon the only issue involved, we are of opinion that the findings of the court are supported by abundant evidence, and the order appealed from should therefore be affirmed. It is so ordered.

ORDER AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.



no steps to bring about the appointment or to treat the  
latter for leaving, and it was not until November 1, 1941  
that a guardian was appointed, on motion of Louise Kelson,  
administratrix of her husband's estate, and the petition  
of March 26, 1939 was then set for trial.

Upon the only issue involved, as one of opinion that  
the findings of the court are supported by competent evidence,  
and the order appealed from should therefore be affirmed,  
it is so ordered.

ORDER AFFIRMED.

William G. G., and Lucian G., counsel.

43210

IN THE MATTER OF THE ESTATE  
OF GIROLAMO FIUMEFREDDO,  
DECEASED.

JOHN FIUMEFREDDO et al.,  
Petitioners - Appellants.

318 A  
} APPEAL FROM CIRCUIT

} COURT, COOK COUNTY.

326 I.A. 261

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

John Fiumefreddo, son of Girolamo Fiumefreddo, deceased, and Jennie, Jerome and James Levatino, his grandchildren, heirs at law and legatees, filed a petition in the Probate court of Cook county to set aside an award to his widow, Nunzia Fiumefreddo, which was granted. On appeal of Charles V. Pagano, administrator with the will annexed, to the Circuit court of Cook county, the order of the Probate court was vacated and the widow's award was reinstated. This appeal is taken from that order.

It appears from the petition filed in the Probate court that Girolamo Fiumefreddo died in Chicago January 10, 1942, leaving personal estate consisting, among other things, of household furniture and furnishings, 413 shares of common stock of the Midland United Company of Delaware, the proceeds of an insurance policy issued by the Union Life Insurance Company of Chicago, accounts receivable, mortgages, two savings accounts, one in the sum of \$2,046.21 on deposit in the City National Bank and Trust Company of Chicago, and the other in the sum of \$2,027.13 on deposit in the Continental Illinois National Bank and Trust Company of Chicago, both held jointly with his wife, Nunzia Fiumefreddo, and an apartment building located at 2119 North Kenmore avenue, Chicago.

Prior to the probate of Fiumefreddo's last will and testament, a settlement agreement was entered into January 21, 1942 among all the heirs at law and next of kin of the deceased, which recited that they were "desirous of making an amicable



IN THE COURT OF THE COMMONS  
OF GREAT BRITAIN

THE PETITION OF

THE PETITIONERS

1941

THE PETITIONERS

THE PETITIONERS

John Thomas, son of Thomas Thomas, deceased,  
and Thomas, Thomas and James Thomas, his grandchildren,  
claimants at law and respondents, filed a petition in the Probate  
Court of Cook County to set aside an order made by the said  
Thomas Thomas, which was granted. On appeal of Charles  
V. Thomas, Administrator with the will annexed, to the  
Probate Court of Cook County, the order of the Probate Court  
was vacated and the widow's share was reinstated. This appeal  
is taken from that order.

It appears from the petition filed in the Probate Court  
that Charles Thomas died in Chicago January 10, 1941,  
leaving personal estate consisting, among other things, of  
household furniture and furnishings, 411 shares of common  
stock of the United States Company of Illinois, the proceeds  
of an insurance policy owned by the said Charles Thomas  
Company of Chicago, accounts receivable, mortgages, two  
savings accounts, one in the sum of \$5,000.00 on deposit in  
the City National Bank and Trust Company of Chicago, and  
the other in the sum of \$2,000.00 on deposit in the Commercial  
Illinois National Bank and Trust Company of Chicago, both held  
jointly with his wife, Emma Thomas, and an apartment  
building located at 1119 North Lawrence Avenue, Chicago.  
Prior to the Probate of Thomas's last will and  
testament, a settlement agreement was entered into January 11,  
1941, among all the heirs at law and next of kin of the deceased,  
which recited that they were "desirous of making an amicable

adjustment, between themselves, concerning certain of said personal property and the said real estate," and that in consideration of the mutual promises of the parties, "particularly the release of interest of the First Party [the widow] in certain real estate at 2119 North Kenmore Avenue \*\*\* to the Second Parties [the other heirs and legatees]," the latter assigned and transferred to the widow the cash deposited in the joint accounts, the household furnishings and furniture, 413 shares of common stock of the Midland United Company, and the proceeds of the Union Life Insurance Company policy; and the widow on her part agreed to quitclaim all of her interest in and to the property described as 2119 North Kenmore avenue, as follows: an undivided one-half to John Fiumefreddo and an undivided one-half to the Levatino grandchildren as joint tenants and not as tenants in common. The agreement further provided that the proceeds of any mortgages and accounts due and owing to the deceased during his lifetime should be distributed upon the collection thereof, one-third to the widow, one-third to John Fiumefreddo, and one-third to the Levatino grandchildren; that the cost of administration should be borne by the son and grandchildren; that the widow should pay all of the expenses of the deceased's last illness; that the funeral expenses should be shared, one-third each, by the widow, John Fiumefreddo, and the Levatino grandchildren; that the widow should be allowed to remain, rent free, in one of the Kenmore avenue apartments for a period not to exceed six months; that the widow, if appointed as executrix, would waive any fee to which she should be entitled as such, and that she would retain and employ as her attorneys the firm of Fleck, Calcagno & Pollack, attorneys for



adjustment, between themselves, concerning certain of said  
personal property and the said real estate, and that in  
consideration of the mutual promises of the parties, "here-  
after" the release of interest of the First Party [the  
widow] in certain real estate at 2119 North Kenmore Avenue  
and to the Second Party [the other heirs and legatees],  
the latter having and transferred to the widow the cash  
deposited in the joint accounts, the household furnishings  
and furniture, all shares of common stock of the Midland  
United Company, and the proceeds of the Union Life Insurance  
Company policy; and the widow on her part agreed to assign  
all of her interest in and to the property described as 2119  
North Kenmore Avenue, as follows: an undivided one-half to  
John Finckelbein and an undivided one-half to the Estate  
Finckelbein as joint tenants and not as tenants in common.  
The agreement further provided that the proceeds of any  
mortgages and accounts due and owing to the deceased during  
his lifetime should be distributed upon the collection there-  
of, one-third to the widow, one-third to John Finckelbein,  
and one-third to the Estate Finckelbein; that the cost  
of administration should be borne by the son and grandchildren;  
that the widow should pay all of the expenses of the deceased's  
last illness; that the funeral expenses should be shared, one-  
third each, by the widow, John Finckelbein, and the Estate  
Finckelbein; that the widow should be allowed to remain,  
rent free, in one of the Kenmore Avenue apartments for a  
period not to exceed six months; that the widow, if appointed  
as executrix, would waive any fee to which she should be  
entitled as such, and that she would retain and employ as her  
attorneys the firm of Black, McKee & Pollack, attorneys for

the son and grandchildren. The concluding paragraph of the contract states that the "document contains the entire agreement between the parties hereto."

Petitioners alleged and they now argue that the agreement disposed of all assets of the deceased and left nothing out of which to pay a widow's award, and in the course of the argument supporting this contention, they go outside the record to assert that "the widow received two bank accounts of substantial amount, the proceeds of which could have been made subject to probate, and which would have decreased her share of such money," and also that "the widow received more than she would have been entitled to had the estate been probated." The administrator likewise goes outside the record, asserting that the furniture was more than 20 years old, that the insurance policy was invalid, the stock worthless and known to be so by petitioners when the agreement was made, that there were no mortgages or accounts receivable due the deceased, and that there were other assets in the estate which were not contemplated, included or mentioned in the family agreement. Since the administrator's answer denied the allegation of the petition that the agreement disposed of all the assets and petitioners failed to introduce any evidence whatever to support the allegation, either in the Probate court or in the Circuit court on appeal, petitioners' argument has no foundation in fact upon the record presented. The agreement itself refutes the contention made. It recites in the opening paragraph that the personal estate of the deceased consisted, "among other things," of household furniture, common stock, etc., and in another clause employs the phrase "concerning certain of the said personal property." Therefore, in the absence of any evidence as to the total assets of the estate, the contro-



the son and grandchildren. The foregoing paragraph of the contract states that the document contains the entire agreement between the parties hereto.

Petitioners alleged and they now argue that the agreement disposed of all assets of the deceased and left nothing out of which to pay a widow's award, and in the course of the argument supporting this contention, they go outside the record to assert that "the widow received two bank accounts of substantial amount, the proceeds of which could have been made subject to probate, and which would have increased her share of such money," and also that "the widow received more than she would have been entitled to had the estate been probated." The administrator likewise goes outside the record, asserting that the husband was more than 15 years old, that the insurance policy was invalid, the stock worthless and known to be so by petitioners when the agreement was made, that there were no mortgages or accounts receivable due the deceased, and that there were other assets in the estate which were not contemplated, in fact or mentioned in the family agreement, since the administrator's answer denied the allegation of the petition that the agreement disposed of all the assets and petitioners failed to introduce any evidence whatever to support the allegation, either in the probate court or in the Circuit court on appeal, petitioners' argument has no foundation in fact upon the record presented. The agreement itself relates the contention made. It recites in the opening paragraph that the personal estate of the deceased consisted, "among other things," of household furniture, common stock, etc., and in another clause employs the phrase "some real estate of the said personal property." Therefore, in the absence of any evidence as to the total assets of the estate, the contro-

versy must be determined from the intent and purpose of the agreement itself.

The authorities are generally to the effect that the widow's award will not be barred by any contract unless it is specifically waived or unless it clearly appears that such was the intention of the parties. Any uncertainty will be resolved in favor of the right. The administrator relies largely on Pratz v. Pratz, 122 Ill. App. 101. In that case Jonathan Pratz and Lucinda Newcomer, before their marriage, entered into an agreement under seal reciting that marriage was intended between them, that they were each possessed of an estate in Stark county, and that in consideration of the intended marriage "each party aforesaid, by these presents, remise, release and relinquish each to the other all right, title and claim as dower or thirds in any portion of personal or real estate of which the said parties may be possessed of at the demise of either, and the survivor further agrees to abide by what either party may see fit and proper to dispose of by will and testament." Jonathan Pratz died, leaving a last will by which he gave his wife Lucinda \$500. On that state of facts the court held that the contract did not deprive the wife of a widow's award, and said: "All that it relinquished is dower and thirds in personal and real estate. Neither of those terms covers the widow's award to which a widow is entitled, notwithstanding her receipt of dower and the portion of the personal property cast upon her by the Statute of Descents. \*\*\* Unless the will provides that a gift to the wife shall bar her of the widow's award, the widow is entitled to the widow's award notwithstanding her acceptance of every provision made her by the will. By this contract the wife agreed to accept whatever her husband saw fit to give her by his last will, but the contract contains no



very much as if it were a contract made for the purpose of the  
contract itself.

The question is whether or not the contract is to be treated as if

it were a contract made for the purpose of the contract itself.

is specifically intended to be treated as if it were a contract

made for the purpose of the contract itself.

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suggestion that she should thereby bar herself of the statutory provision for a widow's award. It may be that the parties meant that these provisions should exclude every other allowance, but they did not say so, and we have no means of ascertaining their intention except the words they employed. A widow's award is viewed with favor by the law, inasmuch as it is established from motives of public policy, and the widow's award will not be barred by any contract unless it is clear that such was the intention of the parties. Inasmuch as the parties did not see fit to employ any language depriving the widow of her right to an award, we think the court below correctly approved the action of the appraisers in that respect. (Italics ours.)

In Yockey v. Marion, 269 Ill. 342, it was held that a provision in an antenuptial contract that the intended wife accepts the provisions made for her "in lieu of and in satisfaction and bar of dower or thirds to which by the common law or by custom or otherwise she might be entitled \*\*\*, in or out of the property" of the intended husband, was not broad enough to bar the widow's award. Mr. Justice Cartwright, speaking for the court, said that "The widow's award is a statutory allowance for the benefit of the widow, and where it is neither released in terms nor by language sufficiently broad to include it, it should not be regarded as relinquished."

McKaig v. Englund, 265 Mich. 214, 251 N. W. 308, presents a situation similar to the one here under consideration. There the husband died intestate, leaving a widow and four children by a previous marriage. After the administrator was appointed on the widow's petition, she entered into an agreement with the children disposing of all the property of the estate, and a quitclaim deed was given by the widow to real estate belonging to the deceased. The children contended that the widow's award



suggestion that the should have been made of the estate  
provision for a widow's share. It may be that the parties meant  
that these provisions should exclude every other claim, but  
they did not say so, and we have no means of ascertaining their  
intention except the words they employed. A widow's share is  
viewed with favor in the law, and it is established  
from motives of public policy, and the widow's share will not  
be denied or cut down unless it is clearly that such was the  
intention of the parties. In this case the parties did not see  
fit to employ any language indicating the wish of her share to  
be denied, or that the widow's share should be cut down, and the estate  
of the deceased in this respect is not affected.

In *James V. Wilson*, 507 Ill. 202, it was held that a  
provision in an instrument directed that the deceased wife  
accepted the provisions made for her in lieu of and in satis-  
faction and bar of dower or share to which by the common law  
or by custom or otherwise she might be entitled, in or out  
of the property of the intended husband, was not broad enough  
to bar the widow's share. In *James V. Wilson*, regarding for  
the court, said that the widow's share is a statutory allow-

ance for the benefit of the widow, and where it is neither  
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it, it should not be regarded as relinquished.

*James V. Wilson*, 507 Ill. 202, presents  
a situation similar to the one here under consideration. There  
the husband died intestate, leaving a widow and four children  
by a previous marriage. After the administration was completed  
on the widow's petition, the order was made as follows: that  
the children disposing of all the property of the estate, and  
a partition deed was given by the widow to four parts belonging  
to the deceased. The children contended that the widow's share

was barred by the contract, but the court held otherwise, and pointed out that there was no agreement to dispense with administration, although the settlement was complete as to the division of the property, and also that there was no agreement for the payment of debts or the widow's allowance. The pertinent part of the opinion is as follows: "So if the estate is being administered she is entitled, as a matter of right, to the statutory allowance, unless for a consideration she has expressly agreed to waive it, or has consented to a distribution without administration. \*\*\* The fact that there was an agreement for division of the property does not in itself bar her right to the statutory allowance for support during the administration of the estate." In the case at bar no provision was made to dispense with probate, and the agreement does not waive the widow's award nor use any language whatever indicative of that intention. Neither does it contain any provision making the agreement supersede or act in bar of probate which has been pending and is still pending in the Probate court:

Cases cited by the administrator follow the principle enunciated in the foregoing decisions. Thus, in Allen v. Allen, 222 Ill. App. 438, the court held that an antenuptial agreement whereby each party releases all rights in the property of the other, will not bar the statutory widow's award. In In re Brown's Will, 274 N.Y.S. 924, the court, in holding that unless a separation agreement has released the wife's right to receive her exemption, she is entitled to have what the law provides, said: "Inference or implication is not sufficient to effect the release of property rights." In In re Andres' Estate, 126 Cal. App. 146, 14 Pac. (2d) 566, the court held that in order to bar a family allowance, the wife's intention to waive her right in a written agreement must be clear and explicit, and



was barred by the contract, but the court held otherwise, and pointed out that there was no agreement to disburse with the administration, although the settlement was completed as to the division of the property, and also that there was no agreement for the payment of debts or the widow's allowance. The pertinent part of the opinion is as follows: "So is the estate in being administered as is entitled, as a matter of right, to the statutory allowance, unless for a consideration the husband expressly agreed to waive it, or has consented to a distribution without waiving it. The fact that there was an agreement for division of the property does not in itself bar her right to the statutory allowance for support during the administration of the estate. In such case it has no provision was made to disburse with property, and the agreement does not waive the widow's share nor use any language showing intention of that intention. Neither does it contain any provision making the agreement operative or not in part of property which has been pending and is still pending in the probate court. Cases cited by the administration follow the principle enunciated in the foregoing decisions. Thus, in Wright v. Wright, 229 Ill. App. 475, the court held that an antenuptial agreement whereby each party released all claims in the property of the other, will not bar the statutory widow's share. In Boyd v. Boyd, 270 Ill. App. 324, the court, in holding that unless a separation agreement has been made the wife's right to receive her maintenance, she is entitled to have what the law provides, said: 'Interference or restriction is not sufficient to affect the release of property rights.' In In re Estate of Boyd, 226 Cal. App. 1st 147, 148, the court held that in order to bar a family allowance, the wife's intention to waive her right in a written agreement must be clear and explicit, and

-7-

that any uncertainty in the language of the agreement will be resolved in favor of the right.

The foregoing authorities are expressive of the settled rule that the statutory allowance for the benefit of the widow will not be regarded as relinquished, unless it is released in express terms or by language sufficiently broad to indicate such intention. Accordingly, we think the Circuit court properly allowed the widow's award in the amount of \$900, and the order is therefore affirmed.

ORDER AFFIRMED.

Sullivan, P. J., and Seanlan, J., concur.



that any uncertainty in the language of the agreement will be resolved in favor of the right.

The foregoing authorities are persuasive of the settled

rule that the statutory allowance for the benefit of the widow

will not be regarded as relinquished, unless it is released

in express terms or by language a judicially sound to indicate

such intention. Accordingly, we think the circuit court

properly allowed the widow's award in the amount of \$200,

and the order is therefore affirmed.

ORDER AFFIRMED.

WILLIAM F. J. and LOUISA J. COMPTON

43048

FRED B. TIDD and A. R. TIDD,  
doing business as FRED B. TIDD  
TYPESETTING COMPANY, and FRED  
B. TIDD TYPESETTING COMPANY,  
a corporation,  
Appellants,

v.

LA SALLE INDUSTRIAL FINANCE  
CORPORATION, a corporation,  
Appellee.

APPEAL FROM CIRCUIT  
COURT OF COOK COUNTY.

326 I.A. 212621

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiffs appeal from an order striking their fourth amended complaint and dismissing the cause.

Fred B. Tidd and A. R. Tidd, plaintiffs, filed a complaint, on the chancery side of the court, for an injunction to restrain defendant from foreclosing a certain chattel mortgage. The complaint alleged that the chattel mortgage was executed by Fred B. Tidd and A. R. Tidd, doing business as Tidd Typesetting Company; that the chattels had theretofore been the property of a corporation of the same name that had been dissolved prior to the execution of the mortgage. Attached to the complaint as exhibits were copies of the chattel mortgage and an affidavit for extension of the same. The mortgage recites that it is made by "Fred B. Tidd Typesetting Company (a corporation, organized and existing under and by virtue of the laws of the state of Illinois)"; that "This mortgage, made, executed and delivered in pursuance of a resolution duly adopted at a meeting of the Board of Directors of the undersigned corporation \* \* \*." The mortgage is signed on behalf of the corporation by Fred B. Tidd, as Vice President, and it bears what purports to be the corporate seal of the corporation. The original mortgage loan, made July 25, 1941, was for \$6,700, and on October 17, 1942, a balance of \$4,500 was extended to





December 7, 1942. In an affidavit for extension, signed by Fred B. Tidd, he states that he is "Vice-President of Fred B. Tidd Typesetting Company, an Illinois Corporation." The basis for the relief asked in the complaint was that a material alteration had been made in the original mortgage and note, by which the date was changed from July 25, 1941, to July 28, 1941, and that the alteration invalidated the instruments; also, that the loan was not in fact made to the corporation, which had been dissolved, but to the individual plaintiffs, and that the loan was in contravention of the Illinois usury laws. Pursuant to section 48 of the Civil Practice Act (ch. 110, par. 172, sec. 48, Ill. Rev. Stat. 1943) defendant filed a motion to dismiss the complaint on the ground that the claim set forth in plaintiffs' pleading had been released, and in support of the motion defendant filed an affidavit of Eli I. Kleinman, president of defendant corporation, to the effect that plaintiffs since the filing of suit had offered to pay the sum of \$6,300 in full settlement of the indebtedness secured by the chattel mortgage, and that on February 9, 1943, the Illinois Credit Company had paid the sum of \$6,300 to defendant in consideration for releases of the chattel mortgage indebtedness of Fred B. Tidd Typesetting Company, and defendant had simultaneously delivered releases of the said chattel mortgage, and at the same time the Illinois Credit Company delivered to defendant an authorization in writing of Fred B. Tidd Typesetting Company signed by Fred B. Tidd, President, authorizing Illinois Credit Company to pay approximately \$6,350 to LaSalle Industrial Finance Corporation and to receive a release of the chattel mortgage and of other evidences of indebtedness. Plaintiffs filed a counter-affidavit. The chancellor granted the motion





to dismiss the chancery complaint but granted plaintiffs ten days to file an amended complaint at law and transferred the cause to the law side of the court. Thereafter plaintiffs filed five successive complaints at law, to each of which a motion to dismiss was filed. Plaintiffs filed the first amended complaint at law without waiting for the ruling by the court upon the motion to dismiss. The same procedure followed the motion to dismiss the first amended complaint. The fourth amended complaint at law names as plaintiffs Fred B. Tidd and A. R. Tidd, who filed the original chancery complaint, which was verified, and also the corporation which the said original complaint alleged had been dissolved. In each motion to dismiss filed by defendant express reference was made to the affidavit filed by defendant in support of its motion to dismiss the original complaint in chancery. The trial judge certifies in the report of proceedings that "At the hearing on the defendant's motion to dismiss the fourth amended complaint there were presented to me and considered by me, among other things, in rendering my decision, without objection by any of the parties, the following items which then formed a part of the court files in the above entitled cause: 1. The original complaint in chancery and exhibits attached thereto and incorporated therein. 2. Motion to dismiss filed by the defendant on March 25, 1943. 3. Affidavit of Eli Kleinman in support of motion to dismiss and Exhibit 1 incorporated therein filed March 25, 1943. 4. Order entered on March 25, 1943 dismissing complaint in chancery and granting leave to file amended complaint at law. 5. Counter-affidavit in opposition of defendant's motion to dismiss filed May 17, 1943."

Defendant's complaint that because of the nature of the brief filed by plaintiffs it has been difficult for it to



to dismiss an amended complaint was granted plaintiff's request for leave to file an amended complaint at law and transferred the cause to the law side of the court. Plaintiff's affidavit filed five successive complaints at law, one of which a motion to dismiss was filed. Plaintiff filed the first amended complaint at law without waiting for the ruling by the court upon the motion to dismiss. The same procedure followed the motion to dismiss the first amended complaint. The fourth amended complaint at law names as plaintiffs First National Bank, et al., who filed the original summary complaint, which was verified, and also the corporation which the said original complaint alleged had been dissolved. In each motion to dismiss filed by defendant against reference was made to the affidavits filed by defendant in support of its motion to dismiss the original complaint in summary. The trial judge certified in the report of proceedings that "at the hearing on the defendant's motion to dismiss the fourth amended complaint there were presented to me and considered by me, among other things, in reaching my decision, without objection by any of the parties, the following items which then formed a part of the court files in the above entitled cases: 1. The original complaint in summary and exhibits attached thereto and incorporated therein. 2. Motion to dismiss filed by the defendant on March 29, 1943. 3. Affidavit of Mr. Newman in support of motion to dismiss and Exhibit I incorporated therein filed March 29, 1943. 4. Order entered on March 29, 1943 dismissing complaint in summary and granting leave to file amended complaint at law. 5. Counter-affidavit in opposition of defendant's motion to dismiss filed May 17, 1943."

Defendant's complaint was because of the nature of the matter filed by plaintiff it has been difficult for it to

ascertain the exact points raised by plaintiffs is not without some merit. We will endeavor, however, to consider plaintiffs' points as we understand them.

Plaintiffs contend: "By their motion to dismiss everything well pleaded in the Fourth Amended Complaint was admitted. The affidavit attached thereto could not be evidenced as it only raised a question of fact, along with the counter-affidavit of Fred B. Tidd. A jury had been demanded and the subject matter of the affidavits were questions for a jury, or for the trial Court on a trial of the event by the court alone upon evidence presented." In connection with the foregoing contention plaintiffs make the following statement: "We do not object to consideration by the Court of the affidavits and counter-affidavits, but do object to the passing on the truth or falsity of the allegations in the affidavits or counter-affidavits as being a violation of our constitutional right to a jury trial." In view of this statement we do not deem it necessary to pass upon the contention of defendant that in passing upon defendant's motion to dismiss the trial court had a right to consider the affidavits even if plaintiffs had objected to his doing so.

In any event, plaintiffs abided by the procedure followed by the trial court and they would have no right upon appeal to question the procedure followed. But plaintiffs' further contention, that the counter-affidavit raised material issues of fact which should have been submitted to a jury, must be considered.

Section 48 of the Civil Practice Act provides that the defendant may file a motion to dismiss the action, supported by affidavits, "where any of the said following defects exist but do not appear upon the face of the complaint: \* \* \* (g) That the claim or demand set forth in the plaintiff's pleading



...and at the same time, we will also be able to ...

[illegible]

the subject of the evidence in the case of the  
of the evidence in the case of the  
the evidence in the case of the

the position on the basis of which the Commission has  
noted a pattern of conduct which is in violation  
of our constitutional right to a fair trial. In view of  
this situation we do not feel it necessary to take any

attending the same and was in fact a member of the organization  
at a time when it was in the hands of the British and was in the hands of the British  
and was in the hands of the British and was in the hands of the British

to question the propriety of the Government's action in  
by the United States and the United Kingdom in  
In any event, the United States and the United Kingdom

of 1965 which should have been submitted to the Commission by the end of 1965, but which was not submitted until 1966.

and that delivery date? I'll get to that.

But you said it was to be a bill you drafted.

That's what I'm following. I'm not to be involved.

(a) The following information is being furnished to you for your information:

has been released." Attached to the affidavit of defendant in support of the motion to dismiss is the following exhibit:

"COPY OF AUTHORIZATION

"The undersigned hereby authorized the Illinois Credit Company, of 188 W. Randolph St., Chicago, Illinois, to pay approximately \$6,350.00 to LaSalle Industrial Finance Company, and balance apply to fire insurance premium.

"The undersigned further authorizes said Illinois Credit Company of Chicago to receive in its behalf, Release of chattel mortgages, paid up Conditional Sales Contract, cancelled chattel mortgage notes, insurance policies, and all other papers pertaining to the undersigned's indebtedness with the above company.

"FRED B. TIDD TYPESETTING CO.

"By Signed Fred B. Tidd  
"President

"Dated January 20th, 1943

"Corporate Seal"

In plaintiffs' counter-affidavit they state that they executed a chattel mortgage (apparently upon the same chattels that were covered by the mortgage given by plaintiffs to defendant) and note to the Illinois Credit Company for the purpose of refinancing defendant's loan to plaintiffs; they admit that they executed and delivered to Illinois Credit Company the direction to pay \$6,300 to defendant in satisfaction of its mortgage and note and to receive in plaintiffs' behalf various releases and canceled documents, and they do not deny that said authorization was given by them to Illinois Credit Company, but they state that after they gave said Credit Company the said direction and authorization they "discovered the facts concerning the material alteration of the said notes and mortgages, and the further fact that the dates therein had



has been released. It is the duty of the court to see that the rights of the parties are protected in the event of the failure to comply with the terms of the order.

ORDER OF THE COURT

The court has heard the evidence and the arguments of the parties. It is the duty of the court to see that the rights of the parties are protected in the event of the failure to comply with the terms of the order. The court has found that the evidence is sufficient to establish the facts of the case. The court has also found that the law is on the side of the plaintiff. The court has therefore granted the relief requested by the plaintiff. The court has also ordered that the costs of the proceedings be paid by the defendant.

IT IS ORDERED that the plaintiff recover the sum of \$10,000 with interest thereon at the rate of 6% per annum from the date of the judgment until paid.

United States Court of Appeals for the Second Circuit  
New York, New York, 1943

"Corporate Seal"

In plaintiff's complaint, it is alleged that defendant executed a certain mortgage in violation of the terms of the deed. It is further alleged that the mortgage was given by plaintiff to defendant for the purpose of retaining defendant's loan to plaintiff; that the mortgage was executed and delivered to plaintiff's Credit Company the direction to pay \$10,000 to defendant in satisfaction of the mortgage and not to receive in plaintiff's behalf various releases and canceled documents, and that the defendant had said authorization was given by them to plaintiff's Credit Company, and they state that after they gave said Credit Company the said authorization and authorization they discovered the facts concerning the material alteration of the said notes and mortgages, and the further fact that the latter therein had

been changed," and thereupon they revoked the authority of the Illinois Credit Company to pay defendant the sum of \$6,300, but they do not aver that defendant had notice or knowledge of the revocation. Defendant, therefore, in view of the agent's apparent authority, is not chargeable with the agent's alleged breach of instructions. If Illinois Credit Company was not authorized to pay to defendant the \$6,300, then that Company would have no claim against plaintiffs for reimbursement of the said sum.

It must be borne in mind that this is not a proceeding to foreclose the chattel mortgage in question or to obtain a judgment on the mortgage note, but it is a suit by a mortgage debtor to recover payments already made, and the burden is upon plaintiffs to prove that it would be against equity and good conscience for defendant to retain the money.

(City of Chicago v. Malkan, 119 Ill. App. 542; Koenig v. Peoples Gas Light & Coke Co., 153 Ill. App. 432; Watson v. Woolverton, 41 Ill. 241, 243.)

The unverified fourth amended complaint alleges that defendant "fraudulently, wrongfully, corruptly and materially" altered the chattel mortgage and the mortgage note by changing the date upon each of the instruments from July 25, 1941, to July 28, 1941. Plaintiffs contend that this was a fraudulent and material alteration by defendant and such alteration voided the note and chattel mortgage, and they argue: "In our case we had a lawful right to have the chattel mortgage renewed [recorded] 10 days after the execution which would have been the 4th of August, 1941, not thereafter, we gave no person a right to record the chattel mortgage any later but this right was wrongfully taken thus unduly lengthening the time of the mortgage coverage and also changing the time





of the power to confess judgment both in the note and garnishee. The Statute of Limitations is affected by the corresponding time and the various laws relating to extensions are also affected since the payee of the mortgage was not required to procure the extension affidavits as soon. \* \* \* So in our case the legal effect of the right to record was changed, the Statute of Limitations was changed the time when extensions could be made was changed and the time when judgment could be confessed against the Plaintiff-Appellants was changed among many other changes in legal effect too numerous to mention. Making this alteration a material alteration." The provision in the statute as to the recording of a chattel mortgage is intended for the protection of creditors; as between the parties to the chattel mortgage it is not necessary to record it. The allegations in the complaint that defendant "fraudulently, wrongfully, corruptly and materially" altered the instruments in question are mere conclusions of the pleader. The alleged change in the dates of the instruments from July 25, 1941, to July 28, 1941, could not adversely affect plaintiffs' rights as to the time when judgment could be confessed against them. The point as to the Statute of Limitations is this: The Statute of Limitations would have run against defendant's right of action three days sooner if defendant had not made the alleged alteration. The point does not merit serious consideration, especially in view of the fact that plaintiffs settled defendant's claim many years before the Statute would have tolled. In plaintiff's fourth amended unverified complaint they allege that the extension agreement was executed by plaintiffs because defendant made false oral representations to plaintiffs that the note and mortgage were made on July 28,



of the court to review the facts and law.  
The statute of limitations is applied by the  
court in the same manner as in the case of a  
claimant who has effected since the date of the mortgage  
was not required to present the mortgage certificate as  
soon as in any case the legal effect of the right  
to record was changed, the date of limitation was  
changed the time when action could be made was changed  
and the time when judgment could be rendered against the  
plaintiff-respondent was changed even when other changes  
in legal effect the mortgage to contain, during this  
alteration a material alteration. The provision in the  
statute as to the recording of a mortgage is intended  
for the protection of creditors as between the parties to  
the mortgage mortgage it is not necessary to record it. The  
allegations in the complaint that defendant fraudulently,  
wrongfully, secretly and unlawfully altered the instruments  
in question are not violations of the statute. The alleged  
change in the date of the instruments from July 21, 1941, to  
July 22, 1941, could not adversely affect plaintiff's rights  
as to the time when judgment could be rendered against them.  
The point as to the date of limitation is this: The  
statute of limitations would have run against defendant's  
right of action three days before the defendant had not made  
the alleged alteration. The point does not make matters  
consideration, especially in view of the fact that plaintiff's  
settled defendant's claim many years before the statute would  
have expired. In plaintiff's fourth amended verified complaint  
they allege that the attention argument was created by  
plaintiff because defendant made their own representations  
to plaintiff that the note and mortgage were made on July 21,

1941, and that plaintiffs executed the extension agreement not knowing that it had been discharged by the material alteration in the instruments and that therefore plaintiffs were not legally liable for the payment of the note, and that by reason of the execution of the extension agreement plaintiffs lost large sums of money in usurious commissions and interests that were charged against them without right under the void agreement; that the execution of the extension notes was "a mere nudum pactum" and plaintiffs were entitled to recover the moneys they paid after the execution of the extension agreement, "since these were paid, without knowledge of the discharge the Court should permit a recovery of the monies so paid by mistake in ignorance of the discharge." This contention and the argument in support of it are based upon the assumption that defendant made fraudulent and material alterations in the note and mortgage, which alterations voided the contract between the parties. The mortgage and the note purported to have been executed by Tidd Type-setting Company, an Illinois corporation, and carried a corporate seal. Plaintiffs held themselves out to defendant as a legally organized corporation and they are estopped to deny the existence of the corporation. (Gay v. Kohlsaat, 80 Ill. App. 178, 186, and cases cited therein.) The Usury statute of Illinois does not apply to corporate borrowers. (Ch. 74, par. 4, Ill. Rev. Stat. 1943.) We have carefully considered the brief of plaintiffs and we fail to find therein any sound ground for the contention that the alleged alteration was a material one and that plaintiffs were damaged, or might have been damaged, by it. Many years ago the Supreme court, in Vogle v. Ripper, 34 Ill. 100, 106, held that "The effect of an alteration in a written instrument depends upon its nature, the person



The first of these is the fact that the
 Government has not been able to
 obtain the necessary information
 from the various sources of
 intelligence to enable it to
 make a proper estimate of the
 situation. This is due to the
 fact that the Government has
 not been able to obtain the
 necessary information from the
 various sources of intelligence
 to enable it to make a proper
 estimate of the situation.

by whom, and the intention with which it was made. If neither the rights or interests, duties or obligations of either of the parties are in any manner changed, an alteration may be considered as immaterial." In Hayes v. Wagner, 220 Ill. 256, 258, it appeared that the written contract "was afterward altered in material respects by changing the amount to be paid for the work from \$52,000 to 54,700, changing the date of the completion of the work, and making other alterations in the agreement." The court held that a material alteration of an executory written contract, even though made without fraudulent intent, destroys the instrument, but if there is an original debt or obligation which was not satisfied or extinguished, a recovery may be had on the original debt or obligation. The court further held that, under the facts of the case, the altered instrument might be offered in evidence, not as a basis for a recovery of damages, but only to show all the facts in relation to its execution as a part of the original transaction, and the changes made in it, in connection with all the facts and circumstances. It may be well to repeat at this point that the instant proceeding is not an action by defendant to foreclose upon the mortgage or to seek judgment upon the mortgage note. In plaintiffs' brief there is a suggestion, rather than a contention, that plaintiffs paid \$4,850 under duress; that when plaintiffs brought the original complaint for an injunction to prevent a threatened foreclosure, defendant in that proceeding made a motion to have a receiver appointed; and plaintiffs intimate that the said motion amounted to duress, and, therefore, plaintiffs can recover the \$4,850. The record does not show that defendant made a motion for the appointment of a receiver of the mortgaged





chattels, but defendant states in its brief that it did make such a motion but that no action was ever taken upon the motion. Such a motion did not constitute duress.

(See Mills v. Forest Preserve District, 345 Ill. 503; Hart v. Strong, 183 Ill. 349.)

After the motion to dismiss the original complaint in chancery had been sustained the trial court allowed plaintiffs five additional opportunities to file a good complaint against defendant. The contention of plaintiffs that their counter-affidavit raised issues of fact which should have been submitted to a jury, is without merit. Under the undisputed facts alleged in defendant's affidavit in support of the motion to dismiss, and the facts admitted in plaintiffs' counter-affidavit, there were no material issues of fact to be submitted to a jury. The action of the trial court, therefore, in sustaining the motion to dismiss the fourth amended complaint was justified.

The order appealed from is affirmed.

ORDER AFFIRMED.

Sullivan, P. J., and Friend, J., concur.





43143

DOUGLAS WILSON,

Appellee,

v.

SUPERB CLEANING & DYEING  
CORPORATION, a corporation,  
and GEORGE BJELLAND,  
Appellants.

326 I.A. 262<sup>3</sup>

APPEAL FROM SUPERIOR

COURT OF COOK COUNTY.

320

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action brought by the driver of a motor vehicle against the driver of another motor vehicle and the latter's employer. Plaintiff sued to recover damages to his automobile and injuries to his person. Each of the defendants filed a counterclaim, the corporation for damage to its automobile and the driver for personal injuries suffered in the accident. The corporation, later, dismissed its counterclaim. The jury returned a verdict in favor of plaintiff against both defendants and assessed his damages at \$1,200. The jury also returned a verdict finding plaintiff not guilty on the counterclaim. The trial court entered a judgment upon both verdicts. Later defendants filed motions for new trials, which were overruled, and defendants appeal from the judgment.

This case was tried before an able and experienced judge and many of the errors usually assigned in cases like the instant one are not urged upon this appeal. But two points are raised: (1) That the court erred in refusing to direct a verdict for defendants at the close of all the evidence because plaintiff's evidence shows that he was guilty of contributory negligence as a matter of law. (2) That the finding by the jury that defendants were negligent is contrary to the manifest weight of the evidence.

The accident occurred on December 10, 1941, about



225. A. 1822

9. 11. 1941

THE UNITED STATES OF AMERICA  
DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION  
WASHINGTON, D. C. 20535

efektivitet, og det er vigtigt, at vi har en god dialog med de forskellige aktører i sektoren.

total and is a good measure of bone density. However,

est ce qu'il y a un autre moyen de faire ça ?

in the subject. The corporation, later, dismissed its

placitum against both herbivores and associated diseases.

that not only a new line for that

for new trials, which are overruled, and defendant

This case was tried before an able and experienced

the instant one was not told upon this subject.

direct a verdict for defendant or to set aside a verdict for defendant and to grant a new trial.

the staff (2) and to retain a reasonable vigilance to

trial to the merit of the evidence.

The accident occurred on December 10, 1941, about

12:30 p. m., at the intersection of Diversey and Oakley avenues. Diversey avenue is a through street and has four lanes of traffic. Oakley avenue does not extend south of Diversey at that intersection. There is a bridge on Diversey, located about 600 feet east of Oakley. From the bridge west to Oakley at the time of the accident there was a continuous line of cars parked on both sides of the street. On the northeast corner of the intersection there is an automobile building, three or four stories high, which is approximately eight feet north of the north curb of Diversey. Plaintiff was a manufacturers' representative and just prior to the accident he had transacted business with the Chicago Pump Company, located a short distance north of Diversey. Defendant Bjelland was about seventy years of age at the time of the accident. He was a solicitor, "on a strictly commission basis," for Superb Cleaning & Dyeing Corporation, defendant, a corporation engaged in the laundry business. At the time in question he was driving an automobile belonging to that corporation and "was going for a pickup." He was wearing bifocal glasses. Plaintiff testified that he was forty-one years old; that after he left the plant of Chicago Pump Company he turned the corner at Wolfram street and went south on Oakley avenue toward Diversey; that he stopped just north of Diversey at the stop sign located eight feet north of the north curb of Diversey; that because of the automobile building on the northeast corner "you have to stop and then watch;" that as he approached the intersection he brought his car to a stop and then proceeded slowly until he could see both ways before he pulled out into the street; that before he proceeded into Diversey avenue he looked east and west, and saw two cars coming east and one car coming west; that the cars that were proceeding east were then about 200 feet from the intersection; that the car that was coming



July 1, 1911, at the intersection of Broadway and  
avenue, Chicago Avenue is a straight street and has  
lanes of traffic. It is a wide street and is  
divided by a median strip. There is a building on  
located about 100 feet west of Broadway. From the  
to July 1, 1911, at the time of the accident there was a  
line of cars parked on both sides of the street. On the  
northwest corner of the intersection there is a building  
building, three or four stories high, which is approximately  
eight feet north of the north curb of Broadway. This  
was a narrow street, approximately 10 feet wide to the  
accident he had the car parked on the Chicago  
corner, located a short distance north of Broadway. The  
Ejland was about seven feet of the line of the  
dent. He was a collector, was a strictly collection  
for papers concerning the Chicago collection, and was  
positioned in the middle of the street. At the time  
question he was driving an automobile belonging to that com-  
position and was going in a hurry. He was wearing a  
glass, which he testified was a new forty-one year old;  
that after he left the place at Chicago Park corner he turned  
the corner at Chicago Park corner and went south on Chicago Avenue  
toward Broadway; that he stopped just south of Broadway at the  
step sign located about 100 feet north of the north curb of Broadway;  
that he was looking at the building on the northwest corner  
"You have to stop and then move," that he is approaching the  
intersection he brought the car to a stop and then proceeded  
slowly until he could see both ways without he pulled out into the  
street; that before he proceeded into Broadway Avenue he looked  
east and west, and saw two cars coming east and one coming  
west; that the cars that were proceeding east were then about  
200 feet from the intersection; that the car that was coming

west was 600 or 700 feet away; that he then proceeded to the center of Diversey and stopped there in order to let the cars going east pass; that he had also stopped his car before he crossed the north curb line of Diversey; that the westbound car was about 600 feet east of Oakley when he pulled into the intersection; that this westbound car did not stop and was going about thirty miles an hour at the time that it collided with his automobile; that while his car was facing south and standing still the westbound car kept coming and struck his car when it was west of the center line of Oakley and facing south; that the left side of his car was caved in by the impact and the left door was caved in about a foot to a foot and a half; that after the collision he saw that the automobile of the Superb Dyeing & Cleaning Corporation was dented at the front end <sup>and</sup> the lights and grill work were dented. Upon cross-examination he testified that before proceeding into Diversey avenue he stopped twice, once at the stop sign and once at the north sidewalk; that after looking west and east he saw that the westbound car was 600 or 700 feet east of Oakley and that he then drove to the center of the street and stopped; that when defendant's car was 500 feet east of Oakley it was still going thirty miles an hour and that his car (plaintiff's) was standing there perfectly still all this time; that defendant's car never slowed down or changed its speed and that it "drove right into the side of my car." He was asked why he did not turn his car east in front of the eastbound automobile and he answered that "you can't cut in in front of somebody." The witness further testified that about the time the eastbound cars passed him his car was hit. Upon redirect examination he testified that the last of the eastbound cars was just about in front of him when defendant's





car hit him. Plaintiff produced no other witness as to the accident. Defendant called Ben S. Freedman, who testified that he was in the United States Army at the time of the trial but was then on a furlough; that he witnessed the accident in question; that defendant's automobile was going west; that plaintiff's car was going south on Oakley and was making a turn into Diversey to go east; that the witness was driving an automobile and was following defendant's car west; that west of the bridge Diversey avenue has four lanes for traffic; that there were "heavily parked" cars on both sides of Diversey west of the bridge; that he first saw defendant's automobile as it was going over the bridge; that the witness was then about ten feet behind defendant's car and he continued to follow it; that defendant's car and his car were going about twenty miles an hour; that he saw plaintiff's car for the first time as it was pulling out into Diversey and that it was then going about ten miles an hour; that he did not see that car stop at any time before the accident; that defendant's car was about twenty-five feet east of the intersection when plaintiff's car pulled out onto Diversey and at that time the witness was about fifty feet behind defendant's car; that as soon as he saw plaintiff's car pull into Diversey defendant's car slowed down; that he saw the impact of the two cars and plaintiff's car was then in motion; that they may have moved a foot or two after the impact; that at the time of the impact defendant's automobile was going ten miles an hour or a little under that; that he did not know any of the parties to the proceeding. Upon cross-examination the witness testified that he was about fifty feet behind defendant's car when the collision occurred; that when the witness's car was seventy-five feet away plaintiff's car was pulling out past the north curb of Diversey; that plaintiff was





a little bit north of the north curb when the witness first saw him; that there may have been some traffic going east at the time; that when the witness was about seventy-five feet away from the intersection the westbound automobile was going about twenty miles an hour and that it slowed down to ten miles an hour or less at the time of the impact; that defendant's car was about twenty-five feet east of the intersection when it started to slow down and the speed of plaintiff's automobile remained about the same during the entire time that he saw it before the collision; that defendant's car kept going straight ahead and did not turn at all prior to the impact; that the front of defendant's car "came in contact with the middle of the left side, right at the doors" of plaintiff's car "making the turn;" that neither of the cars traveled after the impact; that defendant's car after the impact "was facing a little northwest, but still mostly west. Its left wheels were north of the center line [of Diversey] about four or five feet. The front wheels of the southbound car were just about on the center line of Diversey;" that he "couldn't observe to know whether or not this automobile (plaintiff's) came to a standstill before it <sup>entered</sup> the intersection. It may have come to a stop further back, but it didn't from the time I saw it." Upon redirect examination the witness testified that if one were to extend the east curb line of Oakley all the way south across Diversey the accident took place just about on that line. Upon recross-examination the witness testified that plaintiff's automobile, after the impact, was facing southeast, close to a forty-five degree angle; that the front part of that automobile was just about at the east curb of Oakley and the rear part of it was maybe five or six feet west of the east line; that plaintiff's



a little bit north of the north end of the station first  
and then that there was some traffic coming east at  
the time; that when the witness was about twenty-five feet  
away from the intersection the westbound automobile was going  
about twenty miles an hour and that it slowed down as it  
came on down or east at the time of the impact; that before  
and after about twenty-five feet east of the intersection  
when it started to slow down and the speed of plaintiff's  
automobile remained about the same during the entire time  
that he saw it before the collision; that defendant's car  
was going straight ahead and did not turn at all prior to  
the impact; that the front of defendant's car came in contact  
with the middle of the left side, right of the "body" of  
plaintiff's car, having the bumper and right of the same  
traveled after the impact; that defendant's car after the  
impact was facing a little northwest, but still mostly west.  
Its left wheels were north of the center line of the highway  
about four or five feet. The front wheels of the westbound  
car were just about on the center line of the highway; that he  
"couldn't observe to know whether or not this automobile  
(plaintiff's) came to a complete stop before it <sup>entered</sup> the inter-  
section. It may have come to a stop before, but he  
didn't from the time I saw it." Upon request examination  
the witness testified that if he were to return to the same  
spot line of duty all the way south across the highway the  
accident took place just east on that line. Upon request  
examination the witness testified that plaintiff's automobile,  
after the impact, was facing somewhat, close to a forty-five  
degree angle; that the front part of that automobile was just  
about at the east end of the highway and the rear part of it was  
maybe five or six feet west of the east line; that plaintiff's

car was on the west side of Oakley until it started to make the turn, when it came over to the east side of Oakley; that when the witness was seventy-five feet away from Oakley avenue plaintiff's car came over from the westbound lane to the eastbound lane a little bit north of the north curb of Diversey; that in making the turn plaintiff came over to the east side of Diversey. Defendant George Bjelland, who testified for defendants, stated that he was very familiar with the intersection in question; that it was a fairly nice day and the streets were perfectly dry; that as he drove over the bridge he was driving at about twenty-five miles an hour; that as he drove west on the north half of the boulevard he was probably six or seven feet from the center of the street; that he saw plaintiff's car "just a few minutes before the accident." The following then occurred: "Q. Where was this other car when you saw it for the first time? A. Coming in off of Oakley. Q. How far were you away from it at the time you saw it coming in off Oakley, in feet? A. Well, 23, 24 feet, I would say. Q. When you saw this car come in off Oakley, how fast was it going? A. Well, about 20 miles an hour. Q. The other car, that you had the accident with, how fast was it going when it came in off Oakley? A. Well, it seemed to me about ten miles." The witness further testified that when he saw the other car coming in off of Oakley the witness was going about twenty miles an hour and he then slammed on his brakes; that he was then 23 or 24 feet east of Oakley; that "my car struck the center of the other gentlemen's car on the left side;" that he did not see plaintiff's car stop at any time before the impact; that after the impact plaintiff's car moved a few inches but defendant's car did not move at all; that after the accident he did not go back to



car was on the west side of Valley until it started to rain  
the car, when it came over to the east side of Valley; that  
when the witness was twenty-five feet away from Valley Avenue  
plaintiff's car came over from the west side of Valley to the  
east side of Valley. The witness saw the car come over to the  
east side of Valley. Defendant George Johnson, who testi-  
fied for defendant, stated that he was very familiar with the  
intersection in question; that it was a fairly wide way and  
the streets were perfectly dry; that as he drove over the  
bridge he was driving at about twenty-five miles an hour;  
that as he drove east on the north half of the boulevard he  
was probably six or seven feet from the center of the street;  
that he saw plaintiff's car just a few moments before the  
accident. The following were questions: "Q. Where was this  
other car when you saw it for the first time? A. Coming in  
off of Valley. Q. How far were you away from it at the time  
you saw it coming in off Valley, in feet? A. Well, I don't  
know, I would say, I think it was about twenty feet in off  
Valley, how far was it going? A. Well, I don't know, I  
don't know, I don't know, I don't know, I don't know, I don't  
know. Q. The other car, that you had the accident with, how  
fast was it going when it came in off Valley? A. Well, it  
seemed to me about ten miles. The witness further testified  
that when he saw the other car coming in off of Valley the  
witness was going about twenty miles an hour and he then  
skidded on his brakes; that he was then [?] of [?] that east of  
Valley; that he saw the other car coming in off of Valley  
men's car on the left side; that he did not see plaintiff's  
car stop at any time before the impact; that after the impact  
plaintiff's car moved a few inches but defendant's car did not  
move at all; that after the accident he did not go back to

work for Superb Cleaners, that when he did go back to work he took care of his son's church. Upon cross-examination the witness stated that when he was about twenty-four or twenty-five feet east of Oakley plaintiff's car was "coming in on Diversey." The following then occurred: "Q. Well, where was it with reference to the north curb? A. Well, he was coming in off from Oakley, in on the pavement, and I don't know just how many feet he could have been in. \* \* \* Q. The front part of his car was in the intersection when you first saw it? A. Yes sir." The witness then testified that when he first saw plaintiff's car he applied the brakes and that his car went between thirty and thirty-five feet before the impact. "Q. Where was the front of his car with reference to the center line of Diversey Boulevard when the collision occurred? A. Well, he was perhaps a little bit in on the center of the one half. Q. What do you mean by that? A. I mean, travelling from the curb on Diversey, coming in on Diversey, he was about, I would say about in the center of the one half. Q. Do you mean by that that he was in the center of the north half of Diversey at the time the collision occurred? A. Very close." The witness then testified that the front part of his car was not "so badly damaged" by the impact but that he never saw the car in operation after the accident and did not know what became of it. The following then occurred: "Q. The front part of it [defendant's car] was pretty badly damaged in, was it not? A. I don't know. Q. The left side of that southbound automobile was caved in a good bit, was it not? A. I don't know how much."

The contention of defendants that plaintiff upon his own evidence was guilty of contributory negligence as a matter of law is without merit. If we judge plaintiff's conduct solely by his own evidence it appears to us that he was overcautious in not proceeding eastward at the time that he reached the





center line of Diversey avenue and the eastbound automobiles were still some distance away. The argument of defendants that plaintiff's failure to stop and to give defendant's car the right of way was a violation of the ordinances of the City of Chicago and constituted contributory negligence, cannot be based upon plaintiff's evidence. The same answer applies to the further contention of defendant that plaintiff was guilty of contributory negligence because he "cut the corner" in making a left turn into Diversey and thereby violated an ordinance of the City of Chicago and a statute of the State. Plaintiff testified that he stopped twice before entering Diversey avenue and that when he proceeded into Diversey avenue defendant's car was 600 feet east of Oakley. It is idle to argue that under such a state of facts plaintiff was obliged to let defendant's car pass before he entered Diversey avenue. Diversey avenue is a through street and the traffic upon it is heavy. If plaintiff had had to wait until there was no car within 600 feet of the intersection, he would in all probability have had to wait there a long time.

"The question of contributory negligence is one which is pre-eminently a fact for the consideration of the jury. In Thomas v. Buchanan, 357 Ill. 270, the court said,

"The question of due care on the part of the Plaintiff's intestate is always a question of fact to be submitted to a jury whenever there is any evidence in the record which, with any legitimate inference that may reasonably and legally be drawn therefrom, tends to show the exercise of due care on the part of the deceased.' We do not feel that the record in this case would warrant a Court in concluding that the decedent was guilty of contributory negligence as a matter of law. The question of who is entitled to right of way always involves determination as to relative speeds and distances of automobiles



center line of highway and the defendant's automobile  
 were still some distance away. The argument of defendant  
 that plaintiff's failure to stop and give defendant's car  
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 of Chicago and constituted contributory negligence, cannot be  
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 ordinance of the City of Chicago. It is a statute of the State.  
 Plaintiff testified that he stopped twice before entering  
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 obliged to let defendant's car pass before he entered highway  
 because. Highway across is a through street and the traffic  
 upon it is heavy. If plaintiff had had to wait until there  
 was no car within 500 feet of the intersection, he would in  
 all probability have had to wait some time.  
 "The question of contributory negligence is one which  
 is properly left to the jury for their consideration of the facts. In  
Thomas v. The City of Chicago, 317 Ill. 270, the court said,  
 "The question of the care on the part of the plain-  
 tiff in this case is a question of fact to be submitted  
 to a jury whenever there is any evidence in the record which,  
 with any legitimate inference that may reasonably and legally  
 be drawn therefrom, tends to show the negligence of one or more on  
 the part of the defendant." It is not true that the record in  
 this case would warrant a court in concluding that the defendant  
 was guilty of contributory negligence as a matter of law. The  
 question of who is entitled to right of way always involves  
 determination as to relative speeds and distances of automobiles

from the intersection. Kirchoff et al. v. Van Scoy, 301 Ill. App. 366. Unless the action of a person is clearly and palpably negligent, it is not within the province of the court to substitute its judgment for that of the jury. Blumb v. Getz, 366 Ill. 273." Wallace v. Parnell, 306 Ill. App. 310, 314.)

In support of their contention that "the finding that the defendants were negligent, implicit in the jury's verdict, is contrary to the manifest weight of the evidence," defendants argue that no witness corroborated plaintiff as to the manner of the accident, while Bjelland's testimony is corroborated by Freedman's testimony, and that in order to affirm this judgment we must hold that Freedman perjured himself. This court knows from long experience that honest witnesses frequently will differ as to what occurred at the time of an accident. In the case of People v. Hanisch, 361 Ill. 465, the Supreme court, in passing upon a contention similar to the instant one, said (p. 468): "Whatever may be the rule in certain other jurisdictions, we firmly adhere to our often-asserted belief that it is the province of the jury, alone, to determine the weight of the evidence and the credibility of witnesses. If it were not so there would be little use for the jury system. The jury, as a fact-finding body, is of such importance that an abridgement of its functions in this regard and an appropriation of them by the judges would mean the forsaking of a valued tradition in our system of jurisprudence. The utmost caution should be exercised not only by the trial courts but by the reviewing courts to uphold the sanctity of the trial by jury." The above statement in the Hanisch case has been cited with approval by the Supreme court and the Appellate courts. The judges of this court believe in the jury system and heartily approve the statement



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THE VICTIM OF THE ...

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in the English case of the trial by jury. The above statement  
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not as there would be little or no jury system. The jury  
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(p. 448) However, it is to be in a jury system. It is to  
in passing upon a constitution as to the jury only, said  
the case of Engle v. Talbot, 111 U.S. 401, the Supreme Court,  
will either be to want counsel at the time of an indictment, in  
court. Now this long experience that honest witnesses frequently

in the Hanisch case. The able and conscientious judge who tried this case approved the jury's verdicts. Moreover, there are facts in the case that strongly corroborate the testimony of plaintiff. Neither defendant Bjelland nor Freedman contradict plaintiff's statement that there were cars approaching from the west just prior to the accident. Plaintiff testified that defendant's car was going directly west and that it struck his car while it was standing still and facing directly south; that his left door and the left side of his car was caved in about a foot and a half and that defendant's automobile was dented at the front end; that defendant's car was coming straight ahead and never changed its speed. Freedman testified that defendant's automobile "kept going straight ahead, it didn't turn either way, prior to the impact. The front of the automobile that was westbound came in contact with the middle of the left side, right at the doors, of the car going south on Oakley, making the turn;" that the left side of plaintiff's automobile was dented in. Bjelland's testimony was to the effect that he went straight ahead; that "my car struck the center of the other gentleman's car on the left side;" that "my front end came in contact with his automobile." The undisputed evidence as to the condition of plaintiff's automobile after the impact strongly supports plaintiff's testimony, and rebuts Freedman's testimony that plaintiff's automobile at the time of the accident was facing southeast on a forty-five degree angle. Bjelland testified that when he first saw plaintiff the latter was "coming in off of Oakley," "just the front part of his car was in the intersection when I first saw him;" that he "was very close to the center of the north half of Diversey at the time the collision occurred." We find nothing in the testimony of Bjelland to support the testimony of Freedman that plaintiff's





car was making a turn to the east at the time of the accident and that the front of plaintiff's car was as far east as the east curb of Oakley.

After a careful consideration of the evidence in this case we are of the opinion that we would be usurping the functions of the jury to hold that the finding of the jury that defendants were negligent is contrary to the manifest weight of the evidence. Indeed, there is evidence in the record which, if the jury believed it, would have warranted a finding that Bjelland was guilty of gross negligence just before and at the time of the impact.

The judgment of the Superior court of Cook county entered January 6, 1944, is affirmed in toto.

JUDGMENT ENTERED JANUARY  
6, 1944, AFFIRMED IN TOTO.

Sullivan, P. J., and Friend, J., concur.



1. There is no one to talk to in the house who is not a friend of the  
house and who is not a friend of the house.  
2. There is no one to talk to in the house who is not a friend of the  
house and who is not a friend of the house.  
3. There is no one to talk to in the house who is not a friend of the  
house and who is not a friend of the house.

After a careful consideration of the evidence in this case we are of the opinion that we would be denying the functions of the jury to hold that the finding of the jury that defendants were negligent is contrary to the manifest weight of the evidence. Indeed, there is evidence in the record which, if the jury believed it, would have warranted a finding that defendant was guilty of gross negligence just before and at the time of the impact.

THURSDAY, 10 OCTOBER 1990

REPORT OF COMMISSIONER OF THE GENERAL LAND OFFICE

YOUNG, GEORGE WILLIAM  
SPOT HI COUNTY, MISSISSIPPI

10-10-1963

43246

MANSFIELD TURNER and JANNIE TURNER,  
Plaintiffs-Appellees,

v.

L. SINGLEMAN; MARY CRONIN; L. E.  
BARTLETT, doing business as J. S.  
BARTLETT & CO.,

Defendants.

\_\_\_\_\_  
L. E. BARTLETT, doing business as  
J. S. BARTLETT & CO., and L.  
SINGLEMAN,

Defendants-Appellants.

APPEAL FROM CIRCUIT  
COURT OF COOK COUNTY.

321  
326 I.A. 263

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In a proceeding wherein plaintiffs prayed for the specific performance of an agreement between them and Mary G. Cronin for a warranty deed to certain real estate, Judge LaBuy entered a decree finding that the contract was in full force and effect and not forfeited or abandoned; that possession of the premises had been delivered by plaintiffs to Mary G. Cronin in May, 1933, at which time plaintiffs executed an assignment of rents to her and she was to apply the rents on the contract and the mortgage which incumbered the real estate, and when full payment had been made said Cronin was to redeliver possession of the real estate to plaintiffs and convey title to them; that Mary G. Cronin appointed L. E. Bartlett manager and agent of the real estate in the latter part of 1933 and he was to apply the net rentals on the contract and mortgage pursuant to said assignment; that from the date of said Bartlett's appointment he acted as manager and agent of the building; that in 1938 Mary G. Cronin quitclaimed the real estate to L. Singleman, defendant; that from rents collected Bartlett made payments on the \$1,000 mortgage on the property, reducing the mortgage to \$169.18; that plaintiffs made visits to the premises from time to time and to the office of Bartlett for the purpose of obtaining an accounting; that



MARTIND TURNER and JAMES TURNER,  
Plaintiffs-Appellants,

v.

L. SINGELMAN; MARY GROWN; L. B.  
BARTLETT, doing business as L. B.  
BARTLETT & CO.,  
Defendants.

L. SINGELMAN;  
L. B. BARTLETT & CO., and L.  
B. BARTLETT, doing business as

Defendants-Appellants. B.S.C.I.A. 263

MR. JUSTICE SCAMMEL DELIVERED THE OPINION OF THE COURT.

In a proceeding wherein plaintiffs prayed for the specific performance of an agreement between them and Mary G. Grown for a warranty deed to certain real estate, the latter entered a decree finding that the contract was in full force and effect and not forfeited or abandoned; that possession of the premises had been delivered by plaintiffs to Mary G. Grown in May, 1933, at which time plaintiffs executed an assignment of rents to her and she was to apply the rents on the contract and the mortgage which incumbered the real estate, and when full payment had been made said Grown was to redeliver possession of the real estate to plaintiffs and convey title to them; that Mary G. Grown appointed L. W. Bartlett manager and agent of the real estate in the latter part of 1933 and he was to apply the net rentals on the contract and mortgage pursuant to said assignment; that from the date of said Bartlett's appointment he acted as manager and agent of the building; that in 1938 Mary G. Grown disclaimed the real estate to L. Singelman, defendant; that from rents collected Bartlett made payments on the \$1,000 mortgage on the property, reducing the mortgage to \$199.18; that plaintiffs made visits to the premises from time to time and to the office of Bartlett for the purpose of obtaining an accounting; that

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

Bartlett had not accounted for rent receipts and disbursements during the time that he acted as agent. The decree provided, inter alia, "that if in the event the master finds that the rents collected from said premises by L. E. Bartlett doing business as J. S. Bartlett & Company, during the period he has managed same, have been sufficient to pay in full the contract balance and interest, taxes, mortgage indebtedness and interest and repair bills pertaining to said premises, the said L. Singleman shall quit claim all her right, title and interest in said premises to the plaintiffs, and in default thereof, the said master in chancery shall be directed to execute said quit-claim deed. \* \* \* And said cause is hereby referred to \* \* \* a master in chancery of this court to take an account of all the doings, dealings and acts of defendants L. Singleman and L. E. Bartlett doing business as J. S. Bartlett & Company, with all of the property described in the complaint and in the master's report, the rents accrued and collected and disbursements made thereof from time to time by the said L. E. Bartlett from the time he commenced to manage said premises in the latter part of 1933 to date." An order was entered on May 13, 1943, referring the cause to a master in chancery to take testimony of accounting and report conclusions of law and fact. The master filed a report that contained, inter alia, the following:

"Third: That the premises involved herein are located at 5120 South Dearborn Street, Chicago, Illinois, and are improved with a very old building which is in a more or less dilapidated condition.

"Fourth: In the Answer filed by defendant Bartlett prior to the entry of the Decree herein, he maintained that



Barlett had not accounted for rent receipts and disbursements during the time that is set out above. The decree provided, inter alia, "that it is the duty of the master to find that the rents collected from said premises by J. E. Barlett during business as J. E. Barlett & Company, during the period he has managed same, have been sufficient to pay in full the contract balance and interest, taxes, mortgages and other indebtedness, and interest and repair bills pertaining to said premises, the said J. E. Barlett shall quit claim all her right, title and interest in said premises to the plaintiff, and in default thereof, the said master in chambers shall be directed to execute said quit-claim deed, and said order is hereby returned to the master in chambers of this court to take an account of all the debts, dealings and acts of defendants J. E. Barlett and J. E. Barlett & Company, as J. E. Barlett & Company, with all of the property described in the complaint and in the master's report, the rents received and collected and disbursements made thereof from time to time by the said J. E. Barlett from the time he commenced to manage said premises in the latter part of 1933 to date." An order was entered on May 12, 1943, referring the cause to a master in chambers to take testimony of accounting and report conclusions of law and fact. The master filed a report that contained, inter alia, the following:

"Third: That the premises involved herein are located at 5120 South Dearborn Street, Chicago, Illinois, and are improved with a very old building which is in a poor or less dilapidated condition.

"Fourth: In the answer filed by defendant Barlett prior to the entry of the decree herein, he maintained that

he expended the aggregate sum of \$1395.25 for repairs and maintenance of the premises involved; the 'ledger sheets' and receipts submitted by Bartlett at the hearing of this cause showed a purported expenditure of \$1720.00. The work purportedly performed subsequent to the filing of the Answer amounted to \$181.50 therefore leaving an unexplained disbursement totaling \$134.00.

"Fifth: It was stipulated by the parties hereto that Bartlett collected the aggregate sum of \$3559.75 as rents from the premises herein involved for the period from the later part of 1933 to July 14, 1943, and that he has made the following disbursements, to-wit:

Miscellaneous expenses.....	\$ 8.50
Mary G. Cronin.....	9.00
Insurance premium.....	9.00
Prin. Int. on Mgt.....	1199.81
Real Estate Commission.....	<u>177.20</u>
Water Taxes.....	<u>141.40</u>

Total.....\$1545.70

It was further stipulated that there is a balance due on the contract as of June 26, 1932 the sum of \$607.00. Interest thereon from June 26, 1932 to July 14, 1943 amounts to \$400.62, making a total of principal and interest as of July 14, 1943 in the sum of \$1007.62.

"Sixth: In his attempt to sustain the alleged total expenditures of \$1720.00 L. E. Bartlett testified that he is in the real estate business and maintains an office for that purpose at 5111 South State Street; that he had been so engaged in the business continuously for the past fifty-four years; that he commenced operating and managing the premises involved herein from the later part of the year 1933; and that he ordered and checked all work before paying bills and knew work was done.

"(a) That his bookkeeper maintained a daily record in



he expended the aggregate sum of \$1,197.25 for repairs and maintenance of the premises involved; the 'ledger sheets' and receipts submitted by Tarblett at the hearing of this cause showed a purported expenditure of \$1,720.00. The work purportedly performed subsequent to the filing of the answer amounted to \$181.50 therefore leaving an unexplained discrepancy totaling \$134.00.

"Fifth: It was stipulated by the parties hereto that Tarblett collected the aggregate sum of \$3,559.75 as rents from the premises herein involved for the period from the latter part of 1933 to July 14, 1943, and that he has made the following disbursements, to-wit:

Water Taxes.....	141.40
Real Estate Commission.....	177.80
Trin. Int. on Mtg.....	119.81
Insurance premium.....	2.00
Very G. Cronin.....	7.00
Miscellaneous expenses.....	8.50
Total.....	1,197.25

It was further stipulated that there is a balance due on the contract as of June 30, 1943, the sum of \$607.00. Interest thereon from June 30, 1933 to July 14, 1943 amounts to \$400.62, making a total of principal and interest as of July 14, 1943 in the sum of \$1,007.62.

"Sixth: In his attempt to sustain the alleged total expenditures of \$1,720.00 by Tarblett testified that he is in the real estate business and maintains an office for that purpose at 3111 North 14th Street; that he had been so engaged in the business continuously for the past fifty-four years; that he commenced operating and managing the premises involved herein from the latter part of the year 1933; and that he ordered and checked all work before paying bills and that work was done.

"(a) That his bookkeeper maintained a daily record in

which she entered the current receipts and disbursements; that the entries of the daily record were subsequently posted on certain sheets designated as 'ledger sheets'; that he generally supervised the posting. He offered all of the 'ledger sheets' pertaining to the premises involved herein, as defendants collective Exhibit No. 1 of July 14, 1943. These were received in evidence subject to the objections raised by counsel for plaintiff.

"(b) He also offered in evidence a number of purported receipts for work and repairs which he contended were performed on the premises herein involved. These receipts are all on the stationery of J. S. Bartlett & Co. and are purportedly signed by the contractors who did the work. All of these receipts were offered in evidence as defendants collective Exhibit No. 2 and were received subject to the objection of the attorney for plaintiff.

"Seventh: The receipts (defendants collective Exhibit No. 2) were signed by a number of contractors and laborers. Only three of these parties appeared before the Master to testify. These three parties stated that their respective signatures appeared on the receipts; that they are their true and genuine signatures and were signed by them on the respective dates they received the money as evidenced by said receipts.

"Eighth: One, Frank Petrett, who testified that he signed some of the above receipts, was unable to give a detailed statement of the work performed by him on the premises herein involved. He, however, testified that he did remember constructing new posts under the building and raising the building and he received therefor the sum of \$150.00 which is fair and reasonable for the work so performed by him. He further testified



which she entered the church registers and in the meantime, that the entries of the daily record were also correctly noted on certain sheets designated as "ledger sheets" but in conformity with the original. He offered all of the "ledger sheets" pertaining to the premises involved herein, as follows: his collective Exhibit No. 1 of July 1st, 1943. These were received in evidence subject to the objections raised by counsel for plaintiff.

"(1) He also offered in evidence a number of purported receipts for work and repairs which he contended were performed on the premises herein involved. These receipts to the all on the stationery of J. E. Bennett & Co. and are purportedly signed by the contractors who did the work. All of these receipts were offered in evidence as defendants' collective Exhibit No. 2 and were received subject to the objection of the attorney for plaintiff.

"Defendant: The receipts (defendants' collective Exhibit No. 2) were signed by a number of contractors and laborers. Only three of these parties appeared before the court to testify. These three parties stated that their receipts and signatures appeared on the receipts; that they are their true and genuine signatures and were signed by them on the respective dates they received the money as evidenced by said receipts.

"Plaintiff: One, Frank Trotter, who testified that he signed some of the above receipts, was unable to give a detailed statement of the work performed by him on the premises herein involved. He, however, testified that he did remember conducting new posts under the building and raising the building and he received therefor the sum of \$150.00 which is fair and reasonable for the work so performed by him. He further testified

that he remodeled the porch and that a reasonable cost therefor was the sum of \$225.00 which he received from Bartlett. On cross-examination Petrett admitted that he could not read and was therefore unable to determine the contents of the receipts signed by him.

"Ninth: L. C. Gibbs, a contractor who testified on behalf of the plaintiffs, states that he had examined the premises involved herein shortly before appearing at the Master's hearing. That the porch is in a very neglected condition and is in dire need of repair; and that in his opinion no work had been performed on the porch for many years; excepting that a certain board had been nailed on to said porch by some of the tenants. Katie Pope who has been a tenant of the above described premises for the past three years, and whose husband has resided on the premises for the past six years, testified that considerable of the work which was claimed to have been done by Bartlett and the contractors who testified in his behalf had not been actually done. Among other things, she testified that the work alleged to have been done as set forth in the receipt dated December 13, 1940 (defendants collective Exhibit No. 2), was not actually performed; that all Bartlett did, was to furnish a faucet to her husband, who installed the same. She also testified that the work alleged to have been performed as set forth in the receipt dated May 19, 1942, (defendants collective Exhibit No. 2), was not actually performed; that it was even necessary for the tenant to purchase a bowl; that she had requested Bartlett to perform the work set forth in said receipt, but that Bartlett had refused and failed to do so.

"Tenth: From the competent testimony the Master is of the opinion and believes that the remodeling on the porch claimed to have been done by Bartlett and Petrett, was not



[illegible][illegible][illegible]

other things, she testified that she was obliged to have been  
-  
born as set forth in the record dated December 13, 1900 (see  
Exhibits collective exhibit No. 2), was not contrary thereto;  
that all Exhibit 66, was to furnish a basis to her husband,

[illegible]

claimed to have been done by Earlsett and Roberts, was not the opinion and belief that was prevailing on the part of

actually performed by them or either of them; that in fact no remodeling work had been done on said porch for many years.

"Eleventh: James Albert Samuels, an electrical contractor, testified that he performed work on said premises during the years 1939 and 1942 and he received therefor the respective sums of \$25.00 and \$45.00.

"Twelfth: Bartlett claimed to have expended the sum of \$93.00 for court costs and attorney's fees in evicting certain tenants. From the competent evidence the Master believes and finds that said sum of \$93.00 was properly expended and that Bartlett should credit himself with that amount.

"Thirteenth: The bookkeeper who made the entries on the daily record and then posted the entries from the daily record to the 'ledger sheets' did not testify before the Master. The original record books were submitted to plaintiff's counsel for examination. On cross-examination Bartlett stated that he could not remember item for item the work caused to be performed by him on said premises.

"Fourteenth: The Master is of the opinion and believes that Bartlett has failed to substantiate most of the expenditures purportedly made by him. Bartlett did not explain why his bookkeeper could not appear to testify in open court. Many of the purported receipts produced by him were signed by parties who did not appear before the Master to testify as to the signatures and contents thereof. The three witnesses who did testify were on the whole <sup>very</sup> vague and indefinite in their statements.

"Fifteenth: As to the disputed amounts the Master is of the opinion and believes that only the following items should be credited to Bartlett, to-wit:



actually performed by him on either of those days in fact  
no remodeling work was done on said porch for many  
years.

"Exhibit: I have a receipt, an electrician's  
receipt, dated in 1940, for work on said porch  
during the years 1939 and 1940 and he received therefor the  
negative sum of \$1.00 and \$1.00.

"Exhibit: I have a receipt to have executed the sum  
of \$1.00 for work on porch and electrician's fees in electric  
certain amount. From the foregoing evidence the Master be-  
lieves and finds that said sum of \$1.00 was properly ex-  
pended and that said receipt should be allowed with that  
amount.

"Exhibit: The bookkeeper who made the entries on  
the daily record and then posted the entries from the daily  
record to the ledger sheet, did not testify before the  
Master. The original record books were submitted to the  
this counsel for examination. In cross-examination Plaintiff  
stated that he could not remember item for item the work  
caused to be performed by him on said porch.

"Exhibit: The Master is of the opinion and believes  
that Plaintiff has failed to substantiate most of the original-  
ly submitted receipts and that Plaintiff has not established any  
his bookkeeper could not appear to testify in said court.  
Any of the proposed receipts proposed by him were signed  
by parties who did not appear before the Master to testify  
as to the amount and contents thereof. The three wit-  
nesses who did testify were on the whole <sup>very</sup> vague and indefinite  
in their statements.

"Exhibit: As to the disputed amount the Master is  
of the opinion and believes that only the following items  
should be credited to Plaintiff, to-wit:

1. Re-posting building.....	\$150.00	
2. Eviction costs.....	93.00	
3. Electrical work.....	70.00	\$313.00

The Master cannot help but feel that other expenditures were made by Bartlett in maintaining the premises; however, the said expenditures have not properly been proved and therefore cannot be allowed.

"Sixteenth: The account of the parties hereto as of July 14, 1943 is therefore as follows:

1. Receipts.....		\$3559.75
2. Expenditures		
(a) As per stipulation....	\$1545.70	
(b) As per paragraph		
Fifteenth.....	<u>313.00</u>	\$1858.70
3. Due on contract for principal and interest.....		1007.62
		<u>\$2866.32</u>
4. Balance due plaintiffs....		\$ 693.43

"Seventeenth: The Master therefore respectfully recommends that a Decree be entered herein in the nature of a judgment at law in favor of plaintiffs, Mansfield Turner and Jannie Turner and against the defendant L. E. Bartlett, doing business as J. S. Bartlett and Co. for the sum of \$693.43 and that execution issue therefor."

The chancellor, Judge Fisher, overruled the exceptions to the master's report and entered a decree in accordance with the recommendations of the master. Defendants L. E. Bartlett, doing business as J. S. Bartlett & Co., and L. Singleman, appeal.

In this court plaintiffs for the first time contended that the assignment of rents executed by plaintiffs to Mary G. Cronin, defendant, limited the duties of said Cronin to collecting rents and applying them on the mortgage and contract payments and that "any payments other than these are unauthorized;" that "she



1. Re-posting building.....	12.00
2. Revision cost.....	12.00
3. Electrical work.....	12.00
	<u>36.00</u>

The Master cannot help but feel that other circumstances were made by mistake in maintaining the premises; however, the said expenditures have not properly been proved and therefore cannot be allowed.

Exhibit: The account of the parties hereto as

of July 14, 1941 is therefore as follows:

1. Receipts.....	500.00
2. Expenditures.....	36.00
(a) as per statement.....	12.00
(b) as per statement.....	24.00
3. Due on contract for principal and interest.....	100.00
4. Balance due plaintiffs....	<u>164.00</u>

Exhibit: The Master therefore respectfully recommends that a decree be entered herein in the sum of a judgment of law in favor of plaintiffs, against defendant and certain other and against the defendant J. E. Bartlett, doing business as J. E. Bartlett and Co. for the sum of \$164.00 and that execution issue therefor."

The Chancellor, Judge Fisher, overruled the exceptions to the master's report and entered a decree in accordance with the recommendations of the master, defendants J. E. Bartlett, doing business as J. E. Bartlett & Co., and J. E. Bartlett, appealing. In this court plaintiffs for the first time contended that the assignment of rents executed by plaintiffs to J. E. Bartlett, defendant, limited the duties of said J. E. Bartlett to collecting rents and applying them on the mortgage and contract payments and that "any payments other than those are unauthorized;" that "the

cannot go beyond the scope of this authority and bind her principal, unless the principal so agrees;" that "there is no evidence in the record that the plaintiffs so agreed. Therefore any payments or evidence of payments which Singleman made either personally or otherwise, for repairs or anything other than payments on the mortgage and contract, were made outside the scope of her authority and not binding upon the plaintiffs." Upon the oral argument plaintiffs' counsel admitted that there was no merit in the foregoing contention and that plaintiffs abandoned it. We might add that the decree of Judge LaBuy instructed the master to give defendants credit for "disbursements made thereof from time to time by the said L. E. Bartlett from the time he commenced to manage said premises in the latter part of 1933 to date." No appeal was taken by any of the parties from that decree.

It is apparent that the contention of plaintiffs, that Bartlett had no authority to make improvements and to pay for the same out of the moneys he collected, was advanced because defendants, in their brief, make it clear that the allowance by the master of \$220 for all repairs made upon the premises during the ten year period was utterly inadequate and that the evidence shows that the master should have allowed defendants \$1,720 for repairs and maintenance of the premises and for eviction costs. It would seem that the often repeated statements of counsel for plaintiffs to the effect that Bartlett appropriated to his own use a large part of the rents and profits which he had collected from the premises over a long period of years, and that to hide the appropriation he created false bills against the property for repairs, must have influenced the master's judgment. The uncontradicted evidence shows that the improvements on the premises consisted of a very



cannot be beyond the scope of this authority and find her principal, unless the contract is agreed, that there is no evidence in the record that the plaintiffs so agreed. Therefore any payment or evidence of payment which defendant made either personally or otherwise, for repairs or anything other than payments on the mortgage and interest, was made outside the scope of her authority and not binding upon the plaintiffs. Upon the oral agreement defendant's counsel admitted that there was no merit in the foregoing contention and that plaintiff's statement is. We might add that the course of Judge Levy illustrated the master to give defendant credit for "disbursements made" except from time to time by the said I. W. Bartlett from the time he commenced to manage said premises in the latter part of 1933 to date. No record was taken by any of the parties from that source. It is apparent that the contention of plaintiffs, that Bartlett had no authority to make improvements and to pay for the same out of the moneys he collected, was advanced because defendants, in their brief, make it clear that the allowance by the master of such for all repairs made upon the premises during the ten year period was utterly inadequate and that the evidence shows that the master should have allowed defendants \$1,720 for repairs and maintenance of the premises and for eviction costs. It would seem that the other reported statements of counsel for plaintiffs to the effect that Bartlett appropriated to his own use a large part of the rents and profits which he had collected from the premises over a long period of years, and that to hide the appropriation he created false bills against the property for repairs, and have advanced the master's judgment. The uncontradicted evidence shows that the improvements on the premises consisted of a very

old frame building that required constant repairs to make it habitable; that it was difficult to keep tenants in the building that would pay the rent, and that every now and then it was necessary to evict a tenant. The amount claimed by defendants for repairs, \$1,720, seems at first blush to be too large, but it must be noted that the said amount covered a period of ten years. While the master allowed for repairs for that period only \$220, he stated in his report that he believed that Bartlett had made more expenditures than he was being allowed, and the master justified his allowance on the ground that certain expenditures had not been properly proved. The master states that many of the receipts produced by Bartlett were signed by parties who did not appear before the court to testify. Three contractors testified for defendants, Frank Petrett, James Albert Samuels and Andrew Steinbach. The charges made for the work done by these three contractors represented approximately eighty per cent of the total expenditures for repairs claimed by defendants, \$1,720. Defendant Bartlett testified that he had been in the real estate business for fifty-four years; that he was admitted to the **bar** in 1902; that he collected the rents from the building at 5120 South Dearborn street from the fall of 1933 to the date of the accounting; that by direction he rendered regular statements of moneys collected and expenditures made to Greenebaum Investment Company, who held the mortgage; that he ordered all of the repairs for the premises after he had decided that they were necessary, and that after they were made he checked the bills off and if they were correct he paid them. Defendants introduced in evidence receipts for all of the repairs claimed to have been made during the entire period save for two pieces of work done by James Albert Samuels,



old frame building that required constant repairs to make it habitable; that it was difficult to keep tenants in the building and would pay the rent, and that every now and then it was necessary to evict a tenant. The amount claimed by defendants for repairs, \$1,150, seems at first glance to be too large, but it must be noted that the said amount covered a period of ten years. While the master allowed for repairs for that period only \$250, he stated in his report that he believed that plaintiff had made more expenditures than he was being allowed, and the master justified his allowance on the ground that certain expenditures had not been properly proved. The master states that many of the receipts produced by plaintiff were signed by parties who did not appear before the court to testify. Three contractors testified for defendants, Frank Lettett, James Albert Daniels and Andrew Steinbach. The charges made for the work done by these three contractors represented approximately eighty per cent of the total expenditures for repairs claimed by defendants, \$1,150. Defendant Lettett testified that he had been in the real estate business for fifty-four years; that he was stationed to the bar in 1902; that he collected the rents from the building at 7120 North Dearborn street from the fall of 1903 to the date of the accounting; that by reason he rendered regular statements of monies collected and expenditures made to Greenbaum Investment Company, who held the mortgage; that he ordered all of the repairs for the premises after he had decided that they were necessary, and that after they were made he checked the bills off and if they were correct he paid them. Defendants introduced in evidence receipts for all of the repairs claimed to have been made during the entire period save for two pieces of work done by James Albert Daniels,

and as to said work the master found it had been done and allowed defendants credit for the same. The receipts offered purport to be signed by the contractors who did the work. Bartlett testified that he knew of his own knowledge that the repairs covered by the receipts were actually made; that he saw each of the receipts signed by the contractor who did the work; that the prices charged were fair and reasonable prices in Chicago at the time that the work was done. Plaintiffs objected to the admission of the receipts upon the ground that they did not believe that the receipts were made at the time that the work was done and that they questioned whether the work was done. The receipts were admitted in evidence.

Frank Petrett testified, for defendants, that he had been a general contractor for fifteen years; that he did repair work on the premises many times; that he keeps no record of the work he does. He identified twenty-five of the receipts that had been offered in evidence as receipts given by him to Bartlett when he was paid for work done. These receipts totaled \$890.35. He further testified that he did the work that was covered by the receipts; that he signed the receipts and got paid for his work, and that the charges made were very reasonable in Chicago at the time that the work was done. The witness went into some detail as to the work that he had done. He stated that he was an Italian and could not read English but could read figures and that when he signed a receipt Bartlett or the girl in the office would read the receipt to him.

Andrew Steinbach, testifying for defendants, stated that he was a general contractor in Chicago for eighteen years and that he did work at 5120 South Dearborn street upon orders from Bartlett; that after he finished the work and it



and as to said work the master found it had been done and allowed defendants credit for the same. The receipts offered in support of the claim by the contractor who did the work, Bartlett testified that he knew of his own knowledge that the repairs covered by the receipts were actually made; that he saw each of the receipts signed by the contractor who did the work; that the prices charged were fair and reasonable prices in Chicago at the time the work was done. Plaintiffs

objected to the admission of the receipts upon the ground that they did not believe that the receipts were made at the time that the work was done and that they questioned whether the work was done. The receipts were admitted in evidence. Frank Bartlett testified, for defendants, that he had been

a general contractor for fifteen years; that he did repair work on the premises many times; that he keeps no record of the work he does. He identified twenty-five of the receipts that had been offered in evidence as receipts given by him to Bartlett when he was paid for work done. These receipts totaled \$890.32. He further testified that he did the work that was covered by the receipts; that he signed the receipts and got paid for his work, and that the charges made were very reasonable in Chicago at the time that the work was done. The witness went into some detail as to the work that he had done. He stated that he was an Italian and could not read English but could read figures and that when he signed a receipt Bartlett or the girl in the office would read the receipt to him.

Andrew Steinbach, testifying for defendants, stated that he was a general contractor in Chicago for eighteen years and that he did work at 2120 South Dearborn street upon orders from Bartlett; that after he finished the work and it

was approved by Bartlett he was paid, and that he then signed receipts; that he did all the work stated in the receipts given by him and that the amounts charged were fair and reasonable; that thirty-four of the receipts offered by defendants bear his name and were signed by him. The witness testified in some detail as to certain work that he had done on the premises. The aggregate amount of the bills rendered by the witness is \$414.

James Albert Samuels, testifying for defendants, stated that he had done electrical work upon the premises upon two occasions; that for one job he charged \$45 and for another, \$25, and he was paid for the work. Receipts were not produced for work done by this witness, but the master found that the work was done and allowed defendants \$70 for the same.

The master found that "the original record books [of Bartlett] were submitted to plaintiffs' counsel for examination." Plaintiffs did not see fit to make use of the same.

Plaintiffs introduced as a witness Katie Pope, who testified that she had lived in the premises for the three years preceding her testimony; that Bartlett decorated "last year"; that since she has been there he decorated the ceiling, fixed holes in walls, calcimining, put paper on wall, painted woodwork; that in February, 1943, "he fixed holes in walls size of window panes, laths were falling. They were working two days and another man came in and did decorating. He papered four rooms and painted the fifth and bathroom;" that they put in two large window panes and five small ones, and that these were the only repairs that were made since she started to live in the building; that Bartlett gave her husband a faucet and her husband put it on himself; that there had been no split pipes or water pipes fixed; that in



was approved by Bartlett he was paid, and that he then signed receipts; that he did all the work stated in the receipts given by him and that the amounts charged were fair and reasonable; that thirty-four of the receipts offered by defendants bear his name and were signed by him. The receipts testified in some detail as to certain work that he had done on the premises. The aggregate amount of the bills rendered by the witness is \$414.

James Albert Smith, testifying for defendants, stated that he had done electrical work upon the premises upon two occasions; that for one job he charged \$45 and for another, \$25, and he was paid for the work. Receipts were not produced for work done by this witness, but the master found that the work was done and allowed defendants \$70 for the same.

The master found that the original record books for Bartlett were submitted to Plaintiff's counsel for examination. Plaintiff's did not see fit to make use of the same.

Plaintiff introduced as a witness Jessie Pope, who testified that she had lived in the premises for the time years preceding her testimony; that Bartlett decorated "last year"; that since she has been there he decorated the ceiling, fixed holes in walls, calstaining, put paper on walls, painted woodwork; that in February, 1945, "he fixed holes in walls and window panes, and the were falling. They were working two days and another man came in and did something. He papered four rooms and painted the living and bedroom; that they put in two large window panes and five small ones, and that these were the only repairs that were made since she started to live in the building; that Bartlett gave her husband a furnace and her husband put it on himself; that there had been no split pipes or water pipes fixed; that in

her apartment the bowl burst and leaked all the time; that glass was put in windows two different times; that "water ran on a lady;" that the water "kept breaking." While the testimony of this witness shows that certain work was done during the time that she lived there, the master allowed nothing for that work.

Plaintiffs also called L. C. Gibbs, a contractor, and his evidence is stated by the master in his report, but we may add that his testimony was based upon hypothetical questions and it is, in our judgment, entitled to very little weight. Objections were sustained to proper questions put to the witness upon cross-examination. Neither of the plaintiffs testified although the decree entered by Judge LaBuy finds that they "made visits to the premises from time to time"; nor did they see fit to call anyone from the Greenebaum Investment Company, that had received regular statements from Bartlett, as to receipts and expenditures. As defendants argue, that Company was interested in the payment of the mortgage on the premises and would not be likely to tolerate fraudulent statements as to expenditures for repairs. It is difficult for us to understand upon what theory of fact or law the master based his findings. It is clear that he attached little, if any, weight to the receipts introduced by defendants and the testimony offered by them in reference to the receipts and the work covered by the same.

"\* \* \* As between principal and agent, receipts given to the agent for payments made by him in his principal's business are competent evidence of the amounts paid. (Ballance v. Frisby, 2 Scam. 63; People v. Gerold, 265 Ill. 448; Given v. Gould, 39 Me. 410; Sherman v. Crosby, 11 Johns. 70.) A written receipt, if properly identified, is prima facie evidence of the truth of the recitals which it contains.



nothing for that night.

the witness upon cross-examination. Neither of the plaintiffs  
asked any questions of the witness. Questions put to  
weight. Questions were intended to suggest questions put to  
questions and it is, in our judgment, entitled to very little  
weight. But we say that his testimony was based upon hypothetical  
and his evidence is stated by the master in his report,  
plaintiffs also called a. J. Gibbs, a contractor,

[illegible]

to the receipt in the work covered by the same, by reference to the foregoing of them in reference attached little, it may, owing to the receipt introduced or law the matter based on findings. It is clear that in It is difficult for us to understand their theory of fact exchange from it to and without for repairs.

[illegible]

(Jones on Evidence, -2d ed.- sec. 492.)" (People v. Davis, 269 Ill. 256, 272, 273. See, also, Finch v. Carlton, 249 Ill. App. 15, 18.)

"\* \* \* The party may produce the vouchers in support of payments and the master is bound to admit them in evidence, but the other side can lay a reasonable ground to show that the vouchers in question can be impeached. The vouchers are prima facie proof of disbursements. (Birkholm v. Wardell, 42 N. J. Eq. 337; Halstead v. Tyng, 29 id. 86; 1 Ency. of Evidence, 145. See, also, 39 Cyc. 489, 499.) \* \* \* Plaintiff in error testified before the master during the hearing that the vouchers were true and correct and that he received the vouchers and statements during the progress of the business and examined and checked them with reference to their accuracy. To require the plaintiff in error, when he made this offer, to bring the persons who signed the vouchers to testify to their genuineness, without some proof or something appearing on their face to indicate their lack of genuineness, would be most unreasonable. Such a rule in this case would have consumed a great amount of time in the taking of the testimony, to require which, so far as this record discloses, would be entirely unnecessary. \* \* \* Plaintiff in error himself testified they were genuine, and there is no evidence in the record to contradict his testimony." (Wylie v. Bushnell, 277 Ill. 484, 495. See, also, Byalcs v. Matheson, 328 Ill. 269, 272; Cloyes v. Plattje, 231 Ill. App. 183, 191, 193.)

After a careful review of the evidence we are satisfied that the finding of the master and the finding in the decree that there was a balance due plaintiffs from defendants of \$693.43 is not warranted by the evidence. In our judgment defendants should be allowed \$1,720 for repairs made upon the



(Jones on Evidence, 2d ed., 1911, p. 100) (People v. Davis,  
209 Ill. 275, 75 Ill. 2d 345, 209 Ill. 275, 75 Ill. 2d 345,  
Ill. 2d 345, 75 Ill. 2d 345.)

\* \* \* The party may produce the vouchers in support  
of payments and the matter is bound to admit that in evidence,  
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the vouchers in question can be impeached. The vouchers are  
prima facie proof of disbursements. (People v. Davis,  
42 Ill. 2d 345, 75 Ill. 2d 345, 209 Ill. 275, 75 Ill. 2d 345,  
Evidence, 145, 209 Ill. 275, 75 Ill. 2d 345, 209 Ill. 275,  
first in error testified before the master during the hearing  
that the vouchers were true and correct and that he received  
the vouchers and statements during the progress of the business  
and examined and checked them with reference to their accuracy.  
To require the plaintiff in error, when he made this offer, to  
bring the persons who signed the vouchers to testify to their  
genuineness, without some proof or something appearing on their  
face to indicate their lack of genuineness, would be most un-  
reasonable. Such a rule in this case would have consumed a  
great amount of time in the taking of the testimony, to require  
which, so far as this record discloses, would be entirely un-  
necessary. \* \* \* Plaintiff in error himself testified that  
he examined, and there is no evidence in the record to contra-  
dict his testimony." (People v. Davis, 209 Ill. 275, 75 Ill. 2d 345,  
see, also, People v. Davis, 209 Ill. 275, 75 Ill. 2d 345, 209 Ill. 275,  
Ill. 2d 345, 75 Ill. 2d 345, 209 Ill. 275, 75 Ill. 2d 345.)

After a careful review of the evidence as the evidence  
that the findings of the master and the finding in the degree  
that there was a balance due plaintiff from defendants of  
\$53.43 is not warranted by the evidence. In our judgment  
defendants should be allowed \$17.50 for repairs made upon the

building during the ten year period and that there is a balance due defendant L. Singleman from plaintiffs of \$806.57. In his report the master seems to attach importance to the fact that in the answer filed by defendant Bartlett to the complaint he stated that he expended the aggregate sum of \$1,395.25 for repairs and maintenance of the premises involved, but that the receipts submitted by Bartlett at the hearing showed a purported expenditure of \$1,720, that the work purportedly performed subsequently to the filing of the answer amounted to only \$181.50, leaving an unexplained disbursement totaling \$134. We are satisfied that the evidence shows that the repairs made subsequently to the time of the filing of the answer amounted to \$290.50; that an item of repair work for \$25 done by Samuels prior to the filing of the answer had been omitted in the computation of repairs to February 1, 1942. The master found that Samuels had done the work covered by this item and the master allowed the item. There was also evidence to show that two small items, \$5.50 and \$3.75, for repairs done before the filing of the answer had been omitted in computing the building repairs to February 1, 1942.

The decree of the Circuit court of Cook county is reversed, and the cause is remanded with directions to the trial court to find that there is due from plaintiffs to L. Singleman, defendant, the sum of \$806.57 and that if the said amount is paid by plaintiffs in thirty days defendant L. Singleman should convey the premises to plaintiffs by warranty deed, and that in default of said conveyance the master convey the same to plaintiffs, and that if plaintiffs should default in the payment of said sum of \$806.57 they should be deprived of their right, title and interest in and to said real estate.

DECREE REVERSED, AND CAUSE  
REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Friend, J., concur.





323 I.A. 264

43269

LAURA L. DOLL,  
Appellee,

v.

CONTINENTAL ILLINOIS NATIONAL  
BANK AND TRUST COMPANY OF  
CHICAGO, Executor of the Last  
Will and Testament of Charles  
T. Stevens, Deceased; DR. B. L.  
STEVENS and RUBY LONGLEY,  
Appellants.

APPEAL FROM CIRCUIT  
COURT OF COOK COUNTY.

322

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Defendants appeal from a decree entered after the report of Master in Chancery Leonard C. Reid (now Judge Reid), to whom the cause had been referred, had been filed and approved. The decree found, inter alia, that about May 2, 1934, Laura L. Doll, plaintiff, and the deceased, Charles T. Stevens, entered into a contract by which plaintiff was to render certain personal services to the deceased, as set forth in the complaint, for which services the deceased was to pay plaintiff by executing his last will and testament whereby she would be paid from his estate the sum of \$1,000 a year for the rendition of said services; that plaintiff upon the making of the contract entered upon the performance thereof and thereafter performed the same until the death of deceased, on March 10, 1943, and rendered to the deceased the services provided for in the agreement; that pursuant to the agreement Stevens executed, on May 2, 1935, his certain codicil to his last will and testament, dated May 16, 1928, by which codicil he gave and bequeathed to plaintiff \$1,000; that on September 16, 1936, pursuant to the agreement, he made and published another codicil to his said last will and testament, by which codicil he bequeathed to plaintiff \$2,000; that on June 4,



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MAURA L. DOLL,

Appellee,

v.

COMMERCIAL TRUST NATIONAL  
BANK AND TRUST COMPANY OF  
CHICAGO, Inc., Trustee of the Last  
Will and Testament of Charles  
T. Stevens, Deceased; M. L. I.  
STEVENS and WIFE, MARY  
Appellants.

ATLANTA, GEORGIA  
COURT OF CIVIL CIRCUIT

IT IS HEREBY ORDERED THAT THE OPINION OF THE COURT  
Defendants appeal from a decree entered after the  
report of Master in Chancery Leonard C. Field (now Judge  
Field), to whom the cause had been referred, had been  
filed and approved. The decree found, inter alia, that  
about May 2, 1934, Maura L. Doll, Plaintiff, and the  
deceased, Charles T. Stevens, entered into a contract by  
which Plaintiff was to render certain personal services to  
the deceased, as set forth in the complaint, for which ser-  
vices the deceased was to pay Plaintiff by executing his  
last will and testament whereby she would be paid from his  
estate the sum of \$1,000 a year for the remainder of said  
services; that Plaintiff upon the making of the contract  
entered upon the performance thereof and thereafter performed  
the same until the death of deceased, on March 10, 1943, and  
rendered to the deceased the services provided for in the  
agreement; that pursuant to the agreement Stevens executed,  
on May 2, 1935, his certain codicil to his last will and  
testament, dated May 15, 1935, by which codicil he gave and  
bequeathed to Plaintiff \$1,000; that on September 16, 1936,  
pursuant to the agreement, he made and published another  
codicil to his said last will and testament, by which  
codicil he bequeathed to Plaintiff \$2,000; that on June 4,

1937, he made, executed and published another codicil to his said last will and testament by which he bequeathed to plaintiff \$3,000; that on July 1, 1938, he made another codicil to his said last will and testament by which he bequeathed to plaintiff \$4,000; that on July 11, 1938, he made and published another codicil to said last will and testament by which he bequeathed to plaintiff \$4,000; that on September 14, 1942, he executed his last will and testament by which he bequeathed to plaintiff \$5,000; that on March 9, 1943, the deceased executed his further<sup>last</sup>/will and testament, revoking all other wills by him ever made and by which he wholly failed to carry out his agreement with plaintiff; that said last will and testament was admitted to probate in the Probate court of Cook county on June 1, 1943, and letters testamentary were issued to the Continental Illinois National Bank and Trust Company of Chicago, which is now the acting executor of said will. The decree finds that by reason of the death of the deceased the court cannot decree specific performance of the contract, but orders, adjudges and decrees that on the whole assets of the estate of the deceased that are now or may hereafter come into the possession of said bank as said executor, "the Court does hereby impress a trust in favor of the plaintiff, Laura L. Doll, for the sum of \$8853.72 together with the master's costs herein fixed in the sum of \$428.90, and for said sums the said Laura L. Doll is hereby given a first and prior lien upon said assets subject, however, to the rights of the creditors of said estate and costs and expenses of the administration thereof. It Is Therefore Ordered \* \* \* that the Continental Illinois National Bank and Trust Company of



1937, he was, executed and published another will to his said last will and testament by which he bequeathed to plaintiff \$10,000; that on July 1, 1937, he made another will to his said last will and testament by which he bequeathed to plaintiff \$4,000; that on July 11, 1937, he made and published another will to his said last will and testament by which he bequeathed to plaintiff \$4,000; that on September 14, 1942, he executed his last will and testament by which he bequeathed to plaintiff \$10,000; that on March 9, 1943, the deceased executed his <sup>last</sup> will and testament, revoking all other wills by him ever made and by which he wholly failed to carry out his agreement with plaintiff; that said last will and testament was admitted to probate in the Probate Court of Cook County on June 1, 1943, and letters testamentary were issued to the Continental Illinois National Bank and Trust Company of Chicago, which is now the acting executor of said will. The decree finds that by reason of the death of the deceased the court cannot decree specific performance of the contract, and orders, judgments and decrees that on the whole assets of the estate of the deceased that are now or may hereafter come into the possession of said bank as said executor, the court does hereby impress a trust in favor of the plaintiff, Laura L. Doll, for the sum of \$29,750.00 together with the interest thereon which said Laura L. Doll is hereby given a first and prior lien upon said assets subject, however, to the rights of the creditors of said estate and costs and expenses of the administration thereof. It is therefore ordered that the Continental Illinois National Bank and Trust Company of

Chicago, as Executor of the Last Will and Testament of Charles T. Stevens, deceased, in due course of administration of said estate pursuant to this decree, pay to the plaintiff Laura L. Doll, said sum of \$8853.72 plus the master's costs herein fixed in the sum of \$428.90."

The following is the report of the master in chancery:

"\* \* \*

"From the pleadings and the evidence submitted, I find as follows:

"1:- That the Court has jurisdiction of the parties and of the subject matter.

"2:- Laura L. Doll, plaintiff herein, filed her complaint in chancery wherein she seeks to compel Continental Illinois National Bank and Trust Company of Chicago, Executor of the Last Will and Testament of Charles T. Stevens, deceased, Dr. B. L. Stevens and Ruby Longley, defendants, to specifically perform an alleged contract or agreement entered into between the plaintiff and Charles T. Stevens, deceased, whereby Charles T. Stevens is said to have agreed with Laura L. Doll, plaintiff, that if she would give him personal care and attention, including cleaning his clothing, washing his shirts and collars, cooking meals for him, accompanying him about, reading to him, acting as his errand messenger, driving him about in his car, and being his companion as long as he should live, that he would make his Will and provide therein that she would be paid from his estate the sum of \$1,000.00 per year for the rendition of said services.

"3:- It appears from the evidence that on May 2, 1935, Charles T. Stevens made, executed and published his certain codicil to his Will bearing date of May 16, 1928, in and by which said codicil he provided:

"WHEREAS, I now desire to dispose of any automobile



Chicago, as Executor of the Last Will and Testament of Charles T. Stevens, deceased, in due course of administration of said estate pursuant to this decree, pay to the plaintiff Laura L. Bell, said sum of \$2000.00 plus the master's costs herein taxed in the sum of \$100.00.

The following is the report of the master in chancery:

\*\*\*

"From the pleadings and the evidence submitted, I find

as follows:

"1:- That the court has jurisdiction of the parties and

of the subject matter.

"2:- Laura L. Bell, plaintiff herein, filed her complaint

in chancery wherein she seeks to compel Continental Illinois National Bank and Trust Company of Chicago, Executor of the Last Will and Testament of Charles T. Stevens, deceased, Dr. E. L. Stevens and Abby Longley, defendants, to specifically perform an alleged contract or agreement entered into between the plaintiff and Charles T. Stevens, deceased, whereby Charles T. Stevens is said to have agreed with Laura L. Bell, plaintiff, that if she would give him personal care and attention, including cleaning his clothing, washing his shirt and collar, cooking meals for him, accompanying him about, reading to him, acting as his errand messenger, driving him about in his car, and being his companion as long as he should live, that he would make his will and provide therein that she would be paid from his estate the sum of \$1,000.00 per year for the rendition of said services.

"3:- It appears from the evidence that on May 2, 1937,

Charles T. Stevens made, executed and published his certain codicil to his will bearing date of May 16, 1938, in and by

which said codicil he provided:

"WHEREAS, I now desire to dispose of my automobile

which I may own at the time of my death by bequest of the same to LAURA DOLL, and to give and bequeath to the same LAURA DOLL the sum of ONE THOUSAND DOLLARS (\$1000.00), and to confirm my said will, except as to such change as it may affect any of the devises or bequests which I have in my said will heretofore made.

"NOW, THEREFORE, I hereby declare that my gifts, devises, and bequests in my aforesaid will of May 16, A. D. 1928, be taken to have been changed by the gift of the said automobile and the sum of One Thousand Dollars (\$1000.00) to LAURA DOLL, but not further or otherwise, and to have been in all other respects confirmed.

"I now, therefore, give and bequeath to the said LAURA DOLL any automobile which I may own at the time of my death, and the sum of ONE THOUSAND DOLLARS (\$1000.00) cash. And I do hereby ratify and confirm my said will in every other respect."

"That on September 16, 1936, Charles T. Stevens made, executed and published another codicil bearing that date to his Will bearing date of May 16, 1928, in and by which codicil he provided:

"WHEREAS, I now desire to dispose of any automobile which I may own at the time of my death by bequest of the same to LAURA DOLL, and to give and bequeath to the same LAURA DOLL the sum of TWO THOUSAND DOLLARS (\$2000.00), and to confirm my said will, except as to such change as it may affect any of the devises or bequests which I have in my said will heretofore made,

"NOW, THEREFORE, I hereby declare that my gifts, devises, and bequests in my aforesaid will of May 16, A. D. 1928, be taken to have been changed by the gift of the said automobile and the sum of Two Thousand Dollars (\$2000.00) to



which I may own at the time of my death by bequest or the same to LARRY DOLL, and to give and bequeath to the same LARRY DOLL the sum of ONE THOUSAND DOLLARS (\$1000.00), and to confirm my said will, except as to such change as it may affect any of the devisees or bequests which I have in my said will heretofore made.

"NOW, THEREFORE, I hereby declare that my said devisees, and bequests in my aforesaid will of May 16, 1928, be taken to have been changed by the gift of the said automobile and the sum of ONE THOUSAND DOLLARS (\$1000.00) to LARRY DOLL, but not further or otherwise, and to have been in all other respects confirmed.

"I now, therefore, give and bequeath to the said LARRY DOLL my automobile which I may own at the time of my death, and the sum of ONE THOUSAND DOLLARS (\$1000.00) cash, and I do hereby ratify and confirm my said will in every other respect."

"That on September 16, 1930, Charles A. Stevens made, executed and published another codicil bearing that date to his will bearing date of May 16, 1928, in and by which codicil he provided:

"WHEREAS, I now desire to dispose of my automobile which I may own at the time of my death by bequest or the same to LARRY DOLL, and to give and bequeath to the same LARRY DOLL the sum of TWO THOUSAND DOLLARS (\$2000.00), and to confirm my said will, except as to such change as it may affect any of the devisees or bequests which I have in my said will heretofore made,

"NOW, THEREFORE, I hereby declare that my said devisees, and bequests in my aforesaid will of May 16, 1928, be taken to have been changed by the gift of the said automobile and the sum of TWO THOUSAND DOLLARS (\$2000.00) to

LAURA DOLL, but not further or otherwise, and to have been in all other respects confirmed.

"I NOW, THEREFORE, give and bequeath to the said LAURA DOLL any automobile which I may own at the time of my death, and the sum of TWO THOUSAND DOLLARS (\$2000.00) cash. And I do hereby ratify and confirm my said will in every other respect.'

"That on June 4, 1937, Charles T. Stevens made, executed and published another codicil bearing that date to his Will bearing date of May 16, 1928, in and by which codicil he provided:

"WHEREAS, I now desire to dispose of any automobile which I may own at the time of my death by bequest of the same to LAURA DOLL, and to give and bequeath to the same LAURA DOLL the sum of THREE THOUSAND DOLLARS (\$3000.00), and to confirm my said will, except as to such change as it may affect any of the devises or bequests which I have in my said will heretofore made,

"NOW, THEREFORE, I hereby declare that my gifts, devises and bequests in my aforesaid will of May 16, A. D. 1928, be taken to have been changed by the gift of the said automobile and the sum of Three Thousand Dollars (\$3000.00) to LAURA DOLL, but not further or otherwise, and to have been in all other respects confirmed.

"I now, therefore, give and bequeath to the said LAURA DOLL any automobile which I may own at the time of my death, and the sum of THREE THOUSAND DOLLARS (\$3000.00) cash. And I do hereby ratify and confirm my said will in every other respect.'

"That on July 1, 1938, Charles T. Stevens made, executed and published another codicil bearing that date to his Will bearing date of May 16, 1928, in and by which codicil he



...but not further or otherwise, and to have been  
in all other respects confirmed.

"I now, therefore, give and bequeath to the said LARA  
BOLL any automobile which I may own at the time of my death,  
and the sum of TWO THOUSAND DOLLARS (\$2,000.00) cash, and I  
do hereby ratify and confirm my said will in every other  
respect."

"That on June 4, 1937, Charles E. Stevens made, executed  
and published another codicil bearing that date to his will  
bearing date of July 16, 1937, in and by which codicil he  
provided:

"I now desire to dispose of any automobile  
which I may own at the time of my death by bequest of the same  
to LARA BOLL, and to give and bequeath to the said LARA BOLL  
the sum of THREE THOUSAND DOLLARS (\$3,000.00), and to confirm  
my said will, except as to such change as it may effect any  
of the devices or bequests which I have in my said will  
heretofore made.

"NOW, THEREFORE, I hereby declare that my said  
devices and bequests in my aforesaid will of July 16, A. D.  
1937, be taken to have been amended by the gift of the said  
automobile and the sum of three thousand dollars (\$3,000.00)  
to LARA BOLL, but not further or otherwise, and to have been  
in all other respects confirmed.

"I now, therefore, give and bequeath to the said LARA  
BOLL any automobile which I may own at the time of my death,  
and the sum of THREE THOUSAND DOLLARS (\$3,000.00) cash, and  
I do hereby ratify and confirm my said will in every other  
respect."

"That on July 1, 1938, Charles E. Stevens made, executed  
and published another codicil bearing that date to his will  
bearing date of July 16, 1938, in and by which codicil he

provided:

"WHEREAS, I now desire to dispose of any automobile which I may own at the time of my death by bequest of the same to LAURA DOLL, and to give and bequeath to the same LAURA DOLL the sum of Four Thousand Dollars (\$4000.00), and to confirm my said will, except as to such change as it may affect any of the devises or bequests which I have in my said will heretofore made,

"NOW, THEREFORE, I hereby declare that my gifts, devises, and bequests in my aforesaid will of May 16, A. D. 1928, to be taken to have been changed by the gift of the said automobile and the sum of Four Thousand Dollars (\$4000.00) to LAURA DOLL, but not further or otherwise, and to have been in all other respects confirmed.

"I now, therefore, give and bequeath to LAURA DOLL, at present residing at 1062 Thorndale Avenue, Chicago, Illinois, who by many words and acts of kindness and sympathy encouraged me when I was heavily burdened by sorrow and ill health, any automobile which I may own at the time of my death, and the sum of Four Thousand Dollars (\$4000.00) cash. And I do hereby ratify and confirm my said will in every other respect.'

"That on July 11, 1938, Charles T. Stevens made, executed and published another codicil bearing that date to his Will bearing date of May 16, 1928, in and by which codicil he provided:

"WHEREAS, I now desire to dispose of any automobile which I may own at the time of my death by bequest of the same to LAURA DOLL, and to give and bequeath to the same LAURA DOLL the sum of Four Thousand Dollars (\$4000.00), and to confirm my said will, except as to such change as it may affect any of the devises or bequests which I have in my



provided:

"I now desire to dispose of my automobile which I may own at the time of my death by bequest of the same to LARA DOLL, and to give and bequest to the same LARA DOLL the sum of four thousand dollars (\$4000.00), and to confirm my said will, except as to such change as it may affect any of the devise or bequests which I have in my said will heretofore made,

"I hereby declare that my gifts, devise, and bequests in my aforesaid will of May 16, A. D. 1936, to be taken to have been changed by the gift of the said automobile and the sum of four thousand dollars (\$4000.00) to LARA DOLL, but not further or otherwise, and to have been in all other respects confirmed.

"I now, therefore, give and bequest to LARA DOLL, at present residing at 1062 Thornbale Avenue, Chicago, Illinois, who by many words and acts of kindness and sympathy encouraged me when I was heavily burdened by sorrow and ill health, my automobile which I may own at the time of my death, and the sum of four thousand dollars (\$4000.00) cash. And I do hereby ratify and confirm my said will in every other respect."

"That on July 11, 1936, Charles F. Stevens, executor and published another codicil bearing date of May 11, 1936, in and by which codicil he provided:

"I now desire to dispose of my automobile which I may own at the time of my death by bequest of the same to LARA DOLL, and to give and bequest to the same LARA DOLL the sum of four thousand dollars (\$4000.00), and to confirm my said will, except as to such change as it may affect any of the devise or bequests which I have in my

said will heretofore made,

"NOW, THEREFORE, I hereby declare that my gifts, devises, and bequests in my aforesaid will of July 11, A. D. 1938, (of even date herewith) be taken to have been changed by the gift of the said automobile and the sum of Four Thousand Dollars (\$4000.00) to LAURA DOLL, but not further or otherwise, and to have been in all other respects confirmed.

"I now, therefore, give and bequeath to LAURA DOLL, at present residing at 1062 Thorndale Avenue, Chicago, Illinois (who by many words and acts of kindness and sympathy encouraged me when I was heavily burdened by sorrow and ill health), any automobile which I may own at the time of my death, and the sum of Four Thousand Dollars (\$4000.00) cash. And I do hereby ratify and confirm my said will in every other respect.'

"That on September 14, 1942, Charles T. Stevens executed his Last Will and Testament expressly thereby revoking all wills and codicils theretofore made and providing therein, inter alia:

"ARTICLE II

"I give and bequeath unto LAURA DOLL, now residing at 1062 Thorndale Avenue, Chicago, Illinois, the sum of FIVE <sup>DOLLARS</sup> THOUSAND/(\$5000.00), to her own use and control absolutely.'

"That on, to-wit, March 9, 1943, Charles T. Stevens executed his further Last Will and Testament wherein he expressly revoked all wills and codicils by him made, and by said Last Will and Testament nominated the Continental Illinois National Bank and Trust Company of Chicago executor thereof and devised and bequeathed all of his property, after the payment of his debts and the expenditure not to exceed One Thousand Dollars (\$1000.00) for the care and maintenance of certain graves, to the defendants, DR. B. L. STEVENS and RUBY LONGLEY.



...and people in my country...

It is not a simple matter to determine the exact date of the first appearance of the word "mammal" in the English language. The word is derived from the Latin "mamma" meaning "breast" and "mammalis" meaning "of the breast". The first recorded use of the word "mammal" in English is found in the 16th century, in the works of the naturalist and explorer, Sir Thomas More.

between myself and the defendant, and I am not in a position to

**II. 1907**

The following information was obtained from the files of the FBI:

On May 10, 1968, at New York City, New York, the following information was obtained from the files of the FBI:

On May 10, 1968, at New York City, New York, the following information was obtained from the files of the FBI:

[illegible]

"4:- \* \* \*

"5:- Martha Mott, a witness for the plaintiff, testified that in the month of September, 1942, at the request of Charles T. Stevens, she made a typed copy of his Last Will and Testament dated September 14, 1942, so that Laura L. Doll would have it in her possession. She further testified that Charles T. Stevens said that he thought Laura was more deserving of the amount of money that he left than any of his relatives and that he thought she had given him the services and that she would receive his income or what he had left after he had died, and he wanted her to have a copy of that Will; that she had done a nice job of taking care of him while he was living, had been nicer than any of his relatives had been, had washed and ironed and gotten meals for him. She further testified that Stevens told her he had made several wills in the past and was putting \$1000.00 each year in the will.

"6:- Charles M. Harvey, a witness for the plaintiff, testified that in the Fall of 1942 Charles T. Stevens told him that he was going to see that Laura Doll was properly paid for the service she rendered in driving the car and otherwise, social. He testified that Stevens referred to Laura Doll as his niece.

"7:- Daisy Cannon, a witness for the plaintiff, testified that in the Fall of 1939 Stevens told her, in the presence of Laura Doll, that he did not know what he would have done without Miss Doll, after the time of his wife's death, he was very depressed and he did not know what he would have done without Miss Doll's help; that she certainly brought him back to life and took care of him and looked after him like his own daughter would; that his relatives had deserted him, that no one came to see him, and that Miss Doll looked after him right along and did so many things for him that he was going to show his appreciation



"6:- Charles E. Stevens, a witness for the plaintiff, testified that in the month of January, 1944, at the request of Charles E. Stevens, who was a copy of his last will and testament dated February 11, 1944, to that James A. Doll would have it in her possession. The witness testified that Charles E. Stevens said that he thought James was more deserving of the amount of money that he left than any of his relatives and that he thought she had given him the money and that she would receive his income or that he had left it to her and her family, and he wanted her to have a copy of that will; that she had done a great deal of telling some of his relatives he was living, and been since then any of his relatives had been, and wanted the money and gotten well for him. The witness testified that Stevens told her he had made several wills in the past and was putting \$100,000 each year in the will.

"6:- Charles E. Stevens, a witness for the plaintiff, testified that in the fall of 1944 Charles E. Stevens told him that he was going to see that James Doll was properly cared for the service and a witness in driving the car and otherwise, social. He testified that Stevens referred to James Doll as his niece.

"7:- Daisy Cannon, a witness for the plaintiff, testified that in the fall of 1944 Stevens told her, in the presence of James Doll, that he did not know what he would have done without Miss Doll, after the time of his wife's death, he was very depressed and he did not know what he would have done without Miss Doll's help; that she certainly brought him back to life and took care of him and looked after him like his own daughter would; that his relatives had deserted him, that no one came to see him, and that Miss Doll looked after him right along and did so many things for him that he was going to show his appreciation

by seeing that she was taken care of; that he mentioned that he had made an agreement to leave her a thousand dollars a year and would see that she got a thousand dollars every year after that as long as he lived; that he wanted her to be taken care of for what she had done for him; that he thought so much of her that he called her his niece; that he thought so much of her that he just wanted to do something for her, and he wanted me to know it; that Miss Doll used to do his laundry and take him things when he was ill. She further testified that in the summer of 1942 in Miss Doll's apartment, in the presence of Laura Doll, Stevens said that he appreciated so much what his niece was doing for him that he did not know how he would have gone on living without her companionship and help. She testified that she had seen Laura Doll and Stevens together several dozen times, either at her apartment or at his hotel.

"8:- Eleanor Shucker, a witness for the plaintiff, testified that she first met Laura Doll in August, 1935, at Deutsch's Restaurant where Laura Doll was employed as a cashier, and that after August, 1935, they became very good friends. She testified that she first met Charles Stevens when Laura Doll introduced her to him in June, 1937, at a dinner party in Laura Doll's apartment. She testified that Laura Doll had been steadily employed since 1935; that she was invited to Laura's apartment at least once or twice a month for dinner and at least every other time Stevens was present for dinner also. She testified that in June, 1937, Stevens told her that he had agreed with Miss Doll that if she looked after him and acted as a companion, he being all alone in the world and being an old man and he had no one else, he would pay her \$1000.00 every year that he lived, as long as Miss Doll would act as his companion solely and look after him. She testified that Stevens told her that Laura was the only person that had any



by seeing that the man was taken care of; that he mentioned that he had made an agreement to leave her a thousand dollars a year and would see that she got a thousand dollars every year after that as long as he lived; that he wanted her to be taken care of for that and that was his plan; that he thought so much of her that he called her his niece; that he thought so much of her that he just wanted to do something for her, and he

wanted her to know it; that when he told her to go to his laundry and take his things when he was ill, the doctor testified that in the summer of 1914 in Laura Doll's apartment, in the presence of Laura Doll, Stevens said that he appreciated so much what his niece was doing for him that he did not know how he would have gone on living without her companionship and help. The testimony that she had seen Laura Doll and Stevens together several dozen times, either at her apartment or at his hotel.

"8- Witness Whicker, a witness for the plaintiff,

testified that she first met Laura Doll in August, 1913, at Dostach's Restaurant where Laura Doll was employed as a waitress, and that after August, 1913, they became very good friends.

She testified that she first met Charles Stevens when Laura Doll introduced her to him in June, 1914, at a dinner party in Laura Doll's apartment. She testified that Laura Doll had been

readily employed since 1913; that she was invited to Laura's

apartment at least once or twice a month for dinner and at

least every other time Stevens was present for dinner also.

She testified that in June, 1914, Stevens told her that he had

agreed with Laura Doll that if she looked after him and acted

as a companion, he being all alone in the world and being an

old man and he had no one else, he would pay her \$1000.00 every

year that he lived, as long as Laura Doll would act as his

companion solely and look after him. She testified that

Stevens told her that Laura was the only person that had any

interest in him since the loss of his wife, and inasmuch as he had no one else that he could rely upon and was not in a position to hire a nurse or constant companion that he would have to pay weekly, that he agreed to leave her this \$1000.00 a year and increase the amount each year, that that would do her more good than to pay her a small weekly sum, and that inasmuch as Laura was capable and employed and worked every day and could look after herself, he preferred leaving the money in one sum. She testified that Laura Doll drove Stevens to any place he wanted to go when her time was permissible, and when she was unable to cook in her own apartment she had dinner out with Stevens; that on many occasions she was invited along to eat out with them, and on such occasions Laura drove the car. She testified that Laura Doll wrote letters for Stevens, took care of his personal apparel, read to him and ran errands for him. She further testified that Stevens told her that he preferred to refer to Miss Doll as his niece due to the fact there were so many years difference in their ages and he didn't want people to misunderstand; that while he had a living niece and nephew, at no time had they given him any thought whether he lived or died, that he wouldn't have known what to do without Miss Doll to look after him. She also testified that Stevens told her in 1937 that he had given Laura a copy of each new codicil which was made so that they would be her protection and that he had the originals. She also testified that Laura Doll brought food twice a week to Mr. Stevens and that he ate in restaurants the other five nights unless he ate with Laura Doll in her apartment. She testified that Laura used to bring his laundry back from his apartment and do it along with her own. She testified that Laura Doll and Stevens exchanged presents on birthdays and Christmas.



interest in his since the loss of his wife, and inasmuch as  
 he had no one else that he could rely on and was not in a  
 position to hire a nurse or constant attendant in the world  
 have to pay well, that he agreed to leave her this \$500.00  
 a year and thereafter the amount each year, that that would be  
 not more good than to pay her a small weekly sum, and that  
 inasmuch as Laura was capable and capable and worked every  
 day and could look after herself, he preferred leaving the  
 money in one sum. The testified that Laura still drove Stevens  
 to any place he wanted to go when her time was permissible, and  
 when she was unable to cook in her own apartment she had dinner  
 out with Stevens, but on any occasion she was invited along  
 to eat out with them, and on such occasions Laura drove the  
 car. The testified that Laura still wrote letters for Stevens,  
 took care of his personal affairs, read to him and ran errands  
 for him. The further testified that Stevens told her that  
 he preferred to refer to Mrs. Bell as his niece due to the  
 fact there were so many years difference in their ages and he  
 didn't want people to misunderstand that while he had a living  
 niece and nephew, at no time had they given him any thought  
 whether he lived or died, that he wouldn't have known what to  
 do without Mrs. Bell to look after him. The also testified  
 that Stevens told her in 1937 that he had given Laura a copy  
 of each new edition which was made so that they would be her  
 protection and that he had the originals. The also testified  
 that Laura still brought food to her to Stevens and  
 that he ate the rest of the food after five or six weeks he  
 ate with Laura Bell in her apartment. The testified that  
 Laura used to bring the laundry back from his apartment and  
 do it along with her own. The testified that Laura Bell  
 and Stevens exchanged presents on Christmas and birthdays.

"9:- Howard D. Moore, a witness for the plaintiff, testified that he first met Laura Doll shortly after Easter, 1942, and first met Stevens in June, 1942, at Laura Doll's apartment where he was having dinner. He testified that in July, 1942, he drove Laura Doll and Stevens out into the country in his car, at which time Stevens explained to him that Miss Doll was not his niece and that her reason for calling him Uncle Charlie was merely a term of address; that his wife had died suddenly some years before and he was left without any relatives that were interested in him; that he met Miss Doll where she was working and took her to a movie and explained to her his situation which is, 'I am a lonely old man;' that he had made an agreement with her to see that she was taken care of if she would continue looking after him and attending to whatever small wants he might have; that the agreement was such that Miss Doll would not receive anything while he was alive but he would leave her a thousand dollars for every year that he lived; that he had made new wills every year with this provision; that she cooked for him on several occasions, that she drove the car, that she would take him out into the country on rides evenings and Sundays, that she would even do his laundry.

"10:- Dr. Gerritt <sup>Cotts,</sup> a witness for the defendants, testified that he had known Charles Stevens ten or twelve years before his death; that he saw Stevens practically every day from January 13, 1943, up to March 10, 1943, the date of his death; that at one time Stevens inquired about his bill and told him it was a little high; that he had a lot of expenses and said he wouldn't have much money and would like to have me cut the bill because he was shy of money; that he gave Miss Doll a little money once in a while; that Stevens told him that



"I am a witness for the plaintiff, testified that he first met James Earl Ray in 1942, and that he lived in the same apartment where he was living at the time. He testified that in July, 1942, he gave James Earl Ray and Stevens out into the country in his car, at which time Stevens explained to him that James Earl Ray was not his name and that his reason for calling him James Earl Ray was merely a form of address; that his wife had died about some years before and he was left without any relatives that were interested in him; that he met James Earl Ray when she was working and took her to a movie and explained to her his situation which is, 'I am a lonely old man'; that he had made an agreement with her to see that she was taken care of if she could continue looking after him and according to whatever small wants he might have; that the agreement was such that James Earl Ray would not receive anything while he was alive but he would leave her a thousand dollars for every year that he lived; that he had made her kill every year with this provision; that she cooked for him on several occasions, that she drove the car, that she would take him out into the country on rides evenings and Sundays, that she would even do his laundry.

"I am a witness for the defendant, testified that he had known Charles Stevens ten or twelve years before his death; that he saw Stevens practically every day from January 1, 1941, up to March 10, 1943, the date of his death; that at one time Stevens mentioned about his bill and told him it was a little high; that he had a lot of expenses and said he wouldn't have much money and would like to have no out the bill because he was shy of money; that he gave James Earl Ray a little money once in a while; that Stevens told him that

Miss Doll would come to see him at the hospital.

"11:- David Skooglund, a cafeteria and hotel man, witness for the defendants, testified that he had known Charles Stevens for twelve or fifteen years; that when his wife was living he saw him in his restaurant every day, and that after her death Stevens ate in his restaurant at least once a day, when he was not out of the city; that after he gave up his job with the railroad and retired he ate in his restaurant quite often, mostly for breakfast and his supper, and most of the time about twice a day.

"12:- Ernest A. Eklund, a witness for the defendants, and an attorney, testified that he first met Charles Stevens about May 2, 1935, when he drew a codicil to his Will. He testified that Stevens told him that he wanted to give a Thousand Dollars to Laura Doll and that he had some doubt in his mind as to how it should be done, and that the codicil was afterwards drawn without any further reasons for his giving the Thousand Dollars; that Stevens discussed with him the reason he wanted to have something in his Will as to why he should give Laura Doll this money; that the folks down in his home town, and other people that he knew, might have some objection to his having given this Thousand Dollars to her, and that it might cause his name to be less bright in their minds than it had been before he gave it to her. He further testified that he told Stevens at that time that it was perfectly all right to give the Thousand Dollars if he wanted to and that he didn't have to put it in his Will as to why he gave it to her, and as a result of that the Will was drawn without any reason for his giving her the Thousand Dollars, nor the automobile which he gave her at that time; that he saw Stevens again in September, 1936, when he wanted to change his Will and give her Two Thousand Dollars; that he saw him again in June, 1937, and at that time



Miss Bell would come to see him at the hospital.

"11:- David Thompson, a physician and hotel man,

witness for the defendant, testified that he had known Charles Stevens for twelve or fifteen years; that when his wife was living, he saw him in his restaurant every day, and that after her death Stevens ate in his restaurant at least once a day, when he was not out of the city; that after he gave up his job with the railroad and retired he ate in his restaurant quite often, mostly for breakfast and his supper, and most of the time about twice a day.

"12:- Ernest A. Wilson, a witness for the defendant,

and an attorney, testified that he first met Charles Stevens about May 2, 1937, when he drew a contract to his will. He

testified that Stevens told him that he wanted to give a thousand dollars to Laura Bell and that he had some doubt in his mind as to how it should be done, and that he so told her afterwards drawn without any further reason for his giving the thousand dollars; that Stevens discussed with him the reason he wanted to leave something in his will as to why he should give Laura Bell this money; that the talks took place in his home town, and other people that he knew, might have some objection to his leaving given this thousand dollars to her, and that it might cause his name to be less bright in their minds than it had been before he gave it to her. He further testified that he told Stevens at that time that it was perfectly all right to give the thousand dollars if he wanted to and that he didn't have to put it in his will as to why he gave it to her, and as a result of that the will was drawn without any reason for his giving her the thousand dollars, nor the witnesses which he gave her at that time; that he saw Stevens again in September, 1936, when he wanted to change his will and give her two thousand dollars; that he saw him again in June, 1937, and at that time

he had raised the amount to Three Thousand Dollars, and still was talking about wanting something in his Will to give his reason for his having given her Three Thousand Dollars. The witness further testified that he suggested that the best idea was to have Stevens write the reason that he thought was the reason for his having given her this money and if he did that every one would understand what it was all about; that Stevens didn't do that but later on in July, 1938, when the next codicil was drawn Stevens brought him a slip of paper on which he had written his reason for giving her the money and that was used in drawing the Will; that the codicil bearing date July 11, 1938, contains the following language:

"I now, therefore, give and bequeath to LAURA DOLL, at present residing at 1062 Thorndale Avenue, Chicago, Illinois, (who by many words and acts of kindness and sympathy encouraged me when I was heavily burdened by sorrow and ill health) any automobile which I may own at the time of my death, and the sum of Four Thousand Dollars (\$4000.00) cash. \* \* \*

"The witness further testified that shortly after this codicil was drawn Stevens came to see him again and asked that a Will be drawn in which he left Laura Doll out completely; that this Will was drawn in July but when Stevens came in to sign it he had changed his mind again and wanted to have Laura Doll in the Will again; that he didn't see Stevens for some time after that and then he asked to have it arranged to have his automobile turned over to Miss Doll, which was done. The witness further testified that the next time he saw Stevens was in September, 1942, when the new Will was drawn in which Stevens left Laura Doll Five Thousand Dollars; that at that time Stevens said he didn't want any mention made as to why he was giving Laura Doll the Five Thousand Dollars; that he said, 'Give her \$5000.00 and then divide up the balance of it between Mrs.



he had raised the amount to three thousand dollars, and still was talking about wanting something in his will to give his reason for his having given her three thousand dollars. The witness further testified that he suggested that the best idea was to have Stevens write the reason that he thought it was the reason for his having given her this money and if he did that every one would understand that it was all about; that Stevens didn't do that but later on in July, 1936, when the next conflict was drawn Stevens brought him a slip of paper on which he had written his reason for giving her the money and that was used in drawing the will; that the conflict bearing date July 11, 1936, contains the following language:

"I now, therefore, give and bequeath to JAMES COLL, at present residing at 1802 Broadway Avenue, Chicago, Illinois, (who by many words and acts of kindness and sympathy encouraged me when I was heavily burdened by sorrow and ill health) my auto office which I own at the time of my death, and the sum of four thousand dollars (\$4,000.00) cash, as follows:

"The witness further testified that shortly after this conflict was drawn Stevens came to see him again and asked that a will be drawn in which he left James Coll one completely; that this will was drawn in July but then Stevens came in to sign it he had changed his mind again and wanted to have James Coll in the will again; that he didn't see Stevens for some time after that and then he asked to have it arranged to have his automobile turned over to James Coll, which was done. The witness further testified that the next time he saw Stevens was in September, 1936, when the new will was drawn in which Stevens left James Coll five thousand dollars; that at that time Stevens said he didn't want any mention made as to why he was giving James Coll the five thousand dollars; that he said, 'Give her \$5,000.00 and then divide up the balance of it between Mrs.

Longley and Dr. Stevens,' and that was done. He further testified that on March 9, 1943, he was told to draw the Will bearing date March 9, 1943, by one of the officers of the Continental Illinois National Bank and Trust Company of Chicago, who had consulted with Stevens; that he drew the Will and went to see Stevens at the hospital with his stenographer, Miss Johnson; that Stevens was in bed and under the care of a doctor and a nurse; that he consulted with Stevens about the execution of the Will; that he took the Will with him, explained it to Stevens and he signed it.

"13:- Edward Hall, a witness for the defendants, and manager of the Melbourne Hotel where Charles Stevens resided during his lifetime, testified that he had known Stevens since 1929; that in 1937 Stevens, while discussing his financial affairs with him, said that he had his niece to look after and that required money; that Stevens ate most of his meals in Skooglund's restaurant; that he ate there sometimes twice a day and sometimes three times, and always his breakfast; that he left his laundry at the hotel desk every week.

"14:- Ruby Longley, one of the defendants and a niece of Charles Stevens, testified that Stevens would call her up every six weeks or two months following the death of his wife in 1933; that he would call to ask about everybody's health and the family in general; that nearly two years after his wife died he told her that he had a lady friend, described her appearance and said she was quite tall and slender and had reddish hair, that she was young and of the Catholic faith, but said that she needn't fear about his marrying again; that on several occasions he mentioned Laura Doll and said that he had called on her and that he took her out to dinner once a week and to the picture show; that three or four years later he said that he would like



Langley and Dr. Stevens, and that was done. The father testified that on March 9, 1943, he was told to draw the will bearing date March 9, 1943, by one of the officers of the United States Illinois National Bank and Trust Company of Chicago, who had consulted with Stevens; that he took the will and went to see Stevens at the hospital with his stenographer, Miss Johnson; that Stevens was in bed and under the care of a doctor and a nurse; that he consulted with Stevens about the execution of the will; that he took the will with him, explained it to Stevens and it signed it.

"13- Edward Hall, a witness for the defendant, and manager of the restaurant where Charles Stevens resided during his lifetime, testified that he had known Stevens since 1929; that in 1937 Stevens, while cleaning his financial affairs with him, said that he had his name so long after and that required money; that Stevens the son of his mother in Chicago's restaurant; that he saw there sometimes twice a day and sometimes three times, and always at breakfast; that he left his laundry at the hotel each every week.

"14- Ruby Jones, one of the defendants and a niece of Charles Stevens, testified that Stevens would call her up every six weeks or two months following the death of his wife in 1933; that he would call to ask about everybody's health and the family in general; that nearly two years after his wife died he told her that he had a lady friend, described her appearance, and said she was quite tall and slender and had red hair; that she was young and of the Catholic faith, but said that she wasn't fear about his marrying again; that on several occasions he mentioned Lewis Hall and said that he had called on her and that he took her out to dinner once a week and to the picture show; that three or four years later he said that he would like

to discontinue his friendship with Laura Doll but that he felt sorry for her. The witness further testified that she went to the hospital the morning he was to be operated on and was in communication with the nurses at all times; that she saw him at the hospital nearly every day; that she visited him at the hotel after he returned from the hospital the first time; that she met Laura Doll there at the hotel one Sunday afternoon; that on that occasion Charles Stevens said that he was expecting Laura Doll and asked her to stay until after she had gone and then said he was trying to break his friendship with her again, that he was being frightened about the expenses at the hospital and he wasn't able to give her the money that he had been giving her. This apparently was the only time that the witness visited Charles Stevens at the hotel although she did testify that he visited her at her home occasionally. The witness further testified that Charles Stevens told her after he went home from the hospital the first time that he wanted to change his Will. The witness further testified that her uncle called a Mr. Cameron at the Continental Bank from the hospital and had him get in touch with Mr. Eklund to go out there and make the Will the day before his death.

"15:- On April 22, 1942, (Defendants' Exhibit No. 3), Charles T. Stevens wrote and signed a statement in which he gave directions with reference to his funeral and the interment of his body in the event of his death. On August 26, 1942, he wrote his niece, Ruby Longley, to the effect that he had been taking medical treatment for about three months, which would indicate that she had not seen or heard from him for at least three months, and in that letter he gave her instructions in detail with reference to his funeral. On September 14, 1942, he made another Will in which he gave Laura Doll \$5000.00 without



to discontinue his relationship with her. He felt sorry for her. The witness further testified that she went to the hospital the morning he was to be operated on and was in communication with the nurses of all floors; that she saw him at the hospital nearly every day; that she visited him at the hotel after he returned from the hospital the first time; that she saw him there at the hotel one Sunday afternoon; that on that occasion Charles Stevens said that he was expecting her to come and asked her to stay until after she had gone and then said he was trying to break his friendship with her again, that he was being very liberal about the expenses at the hospital and he wasn't able to give her the money that he had been giving her. This apparently was the only time that the witness visited Charles Stevens at the hotel although she did testify that he visited her at her home occasionally. The witness further testified that Charles Stevens told her after he went home from the hospital the first time that he wanted to change his will. The witness further testified that her uncle called a Mr. O'Connor at the Continental Bank from the hospital and had him not in town with Mr. Willing to go out there and make the will the day before his death.

"17:- On April 22, 1942, (Exhibit No. 11), Charles T. Stevens wrote and signed a statement in which he gave directions with reference to his funeral and the interment of his body in the event of his death. On August 26, 1942, he wrote his niece, Ruby Doolittle, to the effect that he had been taking medical treatment for about three months, which would indicate that she had not seen or heard from him for at least three months, and in that letter he gave her instructions in detail with reference to his funeral. On September 14, 1942, he also another will in which he gave instructions with reference

giving any reasons why he was giving it to her.

"16:- It appears from the inventory filed in the estate of Charles T. Stevens, deceased, in the Probate Court of Cook County, that the value of the personal estate is in excess of \$9000.00.

#### "FINDINGS

"1. I am convinced from the evidence that Charles Stevens on or about May 2, 1934, entered into an oral agreement with Laura L. Doll, plaintiff, whereby he agreed that if she would give him personal care and attention and act as his companion as long as he should live that he would make his Will and provide therein that she would be paid from his estate the sum of \$1000.00 per year for the rendition of said services, and that after the making of said agreement and in reliance thereon Laura L. Doll, the plaintiff, thereafter continuously until the death of Charles T. Stevens on March 10, 1943, rendered to Charles T. Stevens the services provided for and stipulated in said agreement.

"\* \* \* "

No objection filed by defendants to the master's report challenges the accuracy of the master's statement of the evidence. However, we find, in addition to the evidence stated by the master, certain other evidence that should be mentioned. The witness Martha Mott testified that on numerous occasions Stevens told her that Laura (plaintiff) had done his pressing; that Stevens stated that plaintiff had "washed and ironed and she had gotten meals for him and he said there was nothing like good home cooking at that time. He was always complimenting the cooking." Eleanor Shucker testified that Stevens told her that he met Laura in 1934 and that he had agreed with her then to make out a contract so that Laura would have nothing to worry about; that plaintiff shopped for Stevens and bought his shirts,



giving any reason why he was giving it to her.  
"It appears from the inventory filed in the estate  
of Charles E. Stevens, deceased, in the Probate Court of Cook  
County, that the value of the personal estate is in excess of  
\$9,000.00.

"WITNESSES"

"1. I am advised that the evidence that Charles Stevens  
on or about May 2, 1934, entered into an oral agreement with  
Laura J. Toll, plaintiff, whereby he agreed that if she would  
give him personal care and attention and act as his companion  
as long as he should live that he would leave his will and pro-  
vide therein that she would be paid from his estate the sum of  
\$1,000.00 per year for the maintenance of said services, and that  
after the making of said agreement and in reliance thereon  
Laura J. Toll, the plaintiff, thereafter continuously until  
the death of Charles E. Stevens on March 10, 1935, rendered to  
Charles E. Stevens the services provided for and stipulated in  
said agreement.

"x x x"

No objection filed by defendant to the master's report  
challenges the accuracy of the master's statement of the evi-  
dence. However, we find, in addition to the evidence stated  
by the master, certain other evidence that should be mentioned.  
The witness testified that on numerous occasions  
Stevens told her that Laura (plaintiff) had done his house-  
work that Stevens stated that plaintiff had "washed and ironed and  
she had gotten ready for him and he said there was nothing else  
good home cooking at that time. He was always complaining  
the cooking." Master further testified that Stevens told her  
that he met Laura in 1934 and that he had agreed with her then  
to make out a contract so that Laura would have nothing to worry  
about; that plaintiff shopped for Stevens and bought his shirts,

socks and ties; that many a time Stevens waited downstairs in plaintiff's hotel for her to bring him his food; that every time the witness visited plaintiff she was washing, sewing or repairing something for Stevens. It appears that when Stevens made a will, or a codicil to one, he would then give plaintiff a copy of the same; that he also gave her a copy of the will of September 14, 1942. She was not present when the will of March 9, 1943, was executed and had no knowledge that it was made until some time after the death of Stevens. Stevens was operated on in January, 1943, and then spent two or three weeks in the hospital, during which time he required the constant attention of nurses. Some days before he died he returned to the hospital, and he died the day after the will of March 9, 1943, was executed. Dr. Cotts saw him "practically every day from January 13th up to March 10th, 1943," the day of his death. Stevens was eighty-three years of age. He left no direct descendants. Ruby Longley testified that between 1934 and the time her uncle died she never saw him at any other place than her home until she visited him at the hospital; that she was in the hospital the day that the operation was to have been performed upon Stevens and that about two weeks thereafter she saw him there nearly every afternoon; that after he returned to the hospital the second time she visited him every day; that Stevens never discussed with her the matter of his wills or the codicils to the same until he returned home after the operation, when he told her that Laura (plaintiff) was remembered in his will but that he wanted to change his will. The following occurred during her examination: "The Master: Q. Were you familiar with the contents of the various wills? A. No, I didn't know a thing about it. The only thing I knew, -- I talked to Mr. Cameron and I said 'I feel badly about that.' He said 'You needn't





to, Mrs. Longley, because you have always been in your uncle's will, remembered in the will.'" The following also occurred during her examination: "Q. Now, did you call Mr. Eklund to come out to the hospital with the will? A. No, I never called Mr. Eklund. Q. Do you know how Mr. Eklund got out there? A. Well, my uncle called Mr. Cameron at the Continental Bank, and Mr. Cameron took care of it. I don't know. Q. Your uncle called Mr. Cameron at the bank? A. Yes. Q. And had him get in touch with Mr. Eklund to go out there and make his will? A. Yes, as I understand it. Q. Did you have any conversation with Mr. Stevens about the making of this will? A. Not anything in particular. I was there when he called Mr. Cameron, and that was all. Q. You were in the hospital when he called Mr. Cameron? A. Yes. Q. Was that from the hospital or from the -- A. From the hospital." While Ernest A. Eklund was being interrogated as to the execution of the will of March 9, 1943, the following occurred: Q. Were you sent for to come there? A. Yes, I was. \* \* \* I was told to draw this will by one of the officers of the Continental Illinois Bank, who had consulted with him. \* \* \* Q. Well, did you take the will with you? A. Yes, I took the will with me." Later in the examination he stated that the will was drawn and executed in the hospital.

Defendants contend: "A contract to be enforceable by specific performance must be express and its terms must be definite and certain as shown by clear and convincing proof.

- a. The burden of proving a contract against the estate of a deceased person is upon the plaintiff and should not be allowed on evidence of doubtful authenticity and genuineness.
- b. Evidence of admissions made by a person since dead should be carefully scrutinized inasmuch as such evidence is liable to abuse." The principles of law stated in the foregoing



to, Mrs. Langley, because you have always been in your mother's  
will, mentioned in the will. The will was also executed  
during her lifetime: it was, and you call it, called to  
come out to the hospital with the will. I never  
called Mr. Edmund, I do not know how Mr. Edmund got out  
there? Well, my mother called Mr. Edmund at the Continental  
Bank, and Mr. Edmund took care of it. I don't know. I don't know.  
Uncle called Mr. Edmund at the bank. Yes, I and him  
got in touch with Mr. Edmund to go out there and make his will  
A. Yes, as I understand it. I don't know how you have any conversation  
with Mr. Edmund about the will of this will. I don't know  
that in the hospital. I don't know when he called Mr. Edmund,  
and that was all. I don't know in the hospital when he called  
Mr. Edmund. I don't know that from the hospital or from  
the -- A. From the hospital. While Ernest A. Edmund was being  
interrogated as to the execution of the will of March 2, 1943,  
the following occurred: I don't know how you went to come there?  
A. Yes, I was. I was told to go there, this will by one of  
the officers of the Continental Illinois Bank, who had con-  
sulted with me. I don't know how you told the will with  
you? A. Yes, I took the will with me. Later in the exami-  
nation he stated that the will was given and executed in the  
hospital.

Exhibits contained: "A contract to be enforceable by  
specific performance must be express and its terms must be  
definite and certain as shown by clear and convincing proof.  
a. The burden of proving a contract against the estate of  
a deceased person is upon the plaintiff and should not be  
allowed on evidence of doubtful authenticity and genuineness.  
b. Evidence of admissions made by a person since death should  
be carefully scrutinized inasmuch as such evidence is liable  
to abuse." The principles of law stated in the foregoing

contention are well established.

Defendants further contend that alleged declarations and statements of Stevens made outside the presence of plaintiff are insufficient to make out a case for plaintiff. Defendants cite in support of this contention Vail v. Rynearson, 249 Ill. 501. In that case a decree was entered in the Circuit court in favor of the plaintiff and the Supreme court affirmed the decree. While the opinion states that if the proof of the contract rested upon declarations of Mrs. Harris in the absence of the complainant they would be insufficient, that statement was obiter dictum, for the opinion also states (p. 507) that the contract rested "upon the testimony of the three witnesses who say that they heard it stated between the parties, and if they are to be believed the contract was proved." In Mayo v. Mayo, 302 Ill. 584, the court states (pp. 586, 587): "The rule also is, that while an oral contract to convey land must be established by clear and satisfactory proof, it is not necessary that the contract shall be proved by a third party who heard it made but it may be proved by declarations and conduct of the parties not in the presence of each other. Fletcher v. Osborn, 282 Ill. 143; Kane v. Hudson, 273 id. 350; Lonergan v. Daily, 266 id. 189; Christensen v. Christensen, 265 id. 170; Willis v. Zorger, 258 id. 574; Gladville v. McDole, 247 id. 34; Dalby v. Maxfield, supra [244 Ill. 214]; Daly v. Kohn, 234 Ill. 259; Watson v. Watson, 225 id. 412; Standard v. Standard, 223 id. 255; Geer v. Goudy, 174 id. 514." (See, also, Yager v. Lyon, 337 Ill. 271, 273, 274.) In the instant case most of the statements or admissions of Stevens were made in the presence of plaintiff.

Defendants contend that "the evidence is not sufficient to establish the existence of the contract under the law of



contention are well established.

Defendants further contend that alleged declarations

and statements of Stevens made outside the presence of Plaintiff are insufficient to make out a case for Plaintiff.

Let us now take up the question of this contention.

In Wheeler v. Wheeler, 247 Ill. 511, 91 Ill. App. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

In the instant case in favor of the Plaintiff and the

Defendant, while the opinion

states that in the proof of the contract rested upon de-

clarations of the parties in the absence of the complaint

they would be insufficient, that the contract was either direct

for the opinion also states (p. 100) that the contract rested

upon the testimony of the three witnesses who say that they

heard it stated between the parties, and it may be to be

believed the contract was proved. In Wheeler v. Wheeler, 247 Ill.

511, the court states (p. 512, 513): "The rule also is,

that while an oral contract to convey land must be estab-

lished by clear and satisfactory proof, it is not necessary

that the contract shall be proved by a third party who heard

it made but it may be proved by declarations and conduct of

the parties not in the presence of each other. Wheeler v.

Wheeler, 232 Ill. 143; Wheeler v. Wheeler, 232 Ill. 143; Wheeler v.

Wheeler, 232 Ill. 143; Wheeler v. Wheeler, 232 Ill. 143.

Wheeler v. Wheeler, 232 Ill. 143; Wheeler v. Wheeler, 232 Ill.

143; Wheeler v. Wheeler, 232 Ill. 143; Wheeler v. Wheeler, 232 Ill.

143; Wheeler v. Wheeler, 232 Ill. 143; Wheeler v. Wheeler, 232 Ill.

143; Wheeler v. Wheeler, 232 Ill. 143; Wheeler v. Wheeler, 232 Ill.

143; Wheeler v. Wheeler, 232 Ill. 143; Wheeler v. Wheeler, 232 Ill.

case rest of the statements or admissions of Stevens were

made in the presence of Plaintiff.

Defendants contend that the evidence is not sufficient

to establish the existence of the contract under the law of

this State." The able and experienced master stated that he was "convinced from the evidence" that the contract was made and that it was performed by plaintiff. After a careful consideration of the evidence we find ourselves in full accord with the conclusion of the master. The fact that the deceased, after each codicil and will was executed, save the will of March 9, 1943, gave a copy of each instrument to plaintiff "for her protection," strongly supports plaintiff's theory of fact. Bearing in mind that the alleged agreement provided that the compensation to be paid plaintiff for services rendered was to be \$1,000 a year and that Stevens was to pay her by executing a will which would provide that she should be paid the said compensation from his estate, we find that about a year after the making of the alleged agreement Stevens executed a codicil to his former will by which he willed to plaintiff \$1,000; that after the agreement had been in force two years he made a new codicil willing her \$2,000; that after the agreement had been in force three years he made a new codicil willing her \$3,000, and after the agreement had been in force four years he executed a new codicil willing her \$4,000. Stevens stated that he gave plaintiff a copy of each codicil when it was executed, "for her protection," and it is reasonably clear that he thereby intended to show her that he was living up to his agreement. Defendants call attention to the fact that Stevens, by the will of September 14, 1942, bequeathed to plaintiff only \$5,000, although eight years had then elapsed since the making of the contract; that he gave her a copy of that will and she therefore knew the contents of it, but that the evidence does not show that she made any objection to the amount. When plaintiff was sworn as a witness in her own behalf, counsel for defendants stated that they would exercise their statutory rights and object to her



"The able and experienced master stated that he was convinced from the evidence that the contract was made and that it was performed by plaintiff. After a careful consideration of the evidence we find ourselves in full accord with the conclusion of the master. The fact that the deceased, after each codicil and will was executed, gave the will of March 1, 1943, gave a copy of each instrument to plaintiff 'for her protection,' strongly suggests plaintiff's theory of fact. Bearing in mind that the alleged agreement provided that the compensation to be paid plaintiff for services rendered was to be \$1,000 a year and that Stevens was to pay her by executing a will which would provide that she should be paid the said compensation from his estate, we find that about a year after the making of the alleged agreement Stevens executed a codicil to his former will by which he willed to plaintiff \$1,000; that after the agreement had been in force two years he made a new codicil willing her \$2,000; that after the agreement had been in force three years he made a new codicil willing her \$3,000, and after the agreement had been in force four years he executed a new codicil willing her \$4,000. Stevens stated that he gave plaintiff a copy of each codicil when it was executed, 'for her protection,' and it is reasonably clear that it thereby intended to show her that he was living up to his agreement. Defendants call attention to the fact that Stevens, by the will of September 14, 1943, bequeathed to plaintiff only \$5,000, although about years have then elapsed since the making of the contract; that he gave her a copy of that will and she therefore knew the contents of it, but that the evidence does not show that she made any objection to the amount. When plaintiff was sworn as a witness in her own behalf, counsel for defendants stated that they would exercise their statutory rights and object to her

testifying. The master then asked counsel for defendants to permit him to put one question to plaintiff, but defendants refused to permit the question to be answered. The fact that plaintiff was disqualified as a witness undoubtedly handicapped her in proving her claim. Attorney Eklund, who drew all of the wills and codicils, acted as attorney for Dr. B. L. Stevens and Ruby Longley in the proceedings in the trial court, and represents them in this court. Cameron told Eklund to draw the will. Eklund testified for defendants without withdrawing as their attorney. Defendants argue that <sup>this</sup> ~~his~~ testimony is most important as it proves that Stevens never mentioned to Eklund any contract he had with plaintiff; that if Stevens had made the alleged contract with plaintiff he would have told his lawyer about it, and they insist that Eklund's testimony practically destroys plaintiff's claim. The master passed upon the credibility of Eklund and the weight that should be attached to his testimony, and in doing so it was his duty to consider his evidence in the light of certain rules of law. Our Supreme court has repeatedly condemned the practice of attorneys' remaining in law suits and testifying in behalf of their clients. In Crescio v. Crescio, 365 Ill. 393, the court states (p. 400): "We also again remind the bar that the attorney who assumes the burden of witness while representing his client in a lawsuit does so at a very great detriment to the credibility of his testimony. Wiederhold v. Wiederhold, 305 Ill. 429; Wetzel v. Firebaugh, 251 id. 190." As to the testimony of Ruby Longley that Stevens told her upon a number of occasions that he was trying to break his friendship with plaintiff, it is evident that the master attached little, if any, weight to that testimony. In addition to the fact that the witness was interested in the result of this suit, the said testimony was not supported by any other evidence in

defendants at which time the master told Eklund to draw the will. Eklund testified for defendants without withdrawing as their attorney. Defendants argue that this testimony is most important as it proves that Stevens never mentioned to Eklund any contract he had with plaintiff; that if Stevens had made the alleged contract with plaintiff he would have told his lawyer about it, and they insist that Eklund's testimony practically destroys plaintiff's claim. The master passed upon the credibility of Eklund and the weight that should be attached to his testimony, and in doing so it was his duty to consider his evidence in the light of certain rules of law. Our Supreme court has repeatedly condemned the practice of attorneys' remaining in law suits and testifying in behalf of their clients. In Crescio v. Crescio, 365 Ill. 393, the court states (p. 400): "We also again remind the bar that the attorney who assumes the burden of witness while representing his client in a lawsuit does so at a very great detriment to the credibility of his testimony. Wiederhold v. Wiederhold, 305 Ill. 429; Wetzel v. Firebaugh, 251 id. 190." As to the testimony of Ruby Longley that Stevens told her upon a number of occasions that he was trying to break his friendship with plaintiff, it is evident that the master attached little, if any, weight to that testimony. In addition to the fact that the witness was interested in the result of this suit, the said testimony was not supported by any other evidence in



testifying. The master then asked counsel for defendants to permit him to put a question to plaintiff, but defendant refused to permit the question to be answered. The fact that plaintiff was disqualified as a witness undoubtedly handicapped her in proving her claim. Attorney [Name], who drew all of the bills and checks, acted as attorney for Dr. J. L. Stevens and [Name] in the proceedings in the trial court, and represented her in this court. Counsel told him to read the will. Finding testimony for defendants without referring to their attorney, defendants argue that this testimony is not competent as it proves that Stevens never mentioned to [Name] any contract he had with plaintiff. That Dr. Stevens had the alleged contract with plaintiff he would have told the lawyer about it, and they insist that [Name]'s testimony positively destroys plaintiff's claim. The master passed upon the credibility of [Name] and the weight that should be attached to his testimony, and in doing so it was his duty to consider his evidence in the light of certain rules of law. Our supreme court has repeatedly condemned the practice of attorneys' reasoning in law suits and testifying in behalf of their clients. In Wheeler v. Wheeler, 362 Ill. 399, the court stated (p. 400): "We also again remind the law that the attorney who assumes the burden of witness while representing his client in a lawsuit does so at a very great detriment to the credibility of his testimony. Wheeler v. Wheeler, 362 Ill. 399, 400; Wheeler v. Wheeler, 362 Ill. 399." As to the testimony of [Name] further that Stevens told her upon a number of occasions that he was trying to break his friendship with plaintiff, it is evident that the master attached little weight to that testimony. In addition to the fact that the witness was interested in the result of this suit, the said testimony was not supported by any other evidence in

the case. Even the testimony of Eklund strongly tends to discredit her testimony. We are aware that this is not a proceeding to set aside a will, but the point is made that the will of March 9, 1943, tends to disprove the alleged agreement, and therefore we deem it pertinent to state that it is difficult to believe, in the light of all the facts and circumstances in evidence, that Stevens, who had been ill for several years, who feared death as far back as August, 1942, who underwent an operation in January, 1943, and had been attended daily by a doctor for two months before his death, knowingly and of his own free will executed a will a few hours before his death that omits to mention the woman who, according to his own statements, had been so helpful and kind to him that he did not know how he would have gone on living without her, and in the said will gave practically all of his estate to his nephew and niece, although he had stated to witnesses that his relatives had deserted him and had no interest in him. That Ruby Longley played some part in having the dying man make a new will appears from the evidence. Stevens told Mrs. Longley that he had remembered plaintiff in his will, and Mrs. Longley testified that she said to Cameron, "I feel badly about it." Her answer to the question, whether she had any conversation with Stevens about the making of the will, "Not anything in particular," shows that she did have some talk with him upon the subject. The attorney who drew the last will later appears as the attorney for Mrs. Longley and Dr. Stevens. It may well be that Stevens, who had acknowledged for nine years his indebtedness to plaintiff and had will<sup>ed</sup> her moneys in a number of codicils and a will, did not knowingly and of his own free will repudiate his contract with plaintiff. The evidence does



the case, even the testimony of a strongly biased witness to discredit her testimony. It is clear that this is not a proceeding to set aside a will, but the point is made that the will of March 9, 1941, tends to improve the alleged agreement, and therefore is not in violation of state law it is difficult to believe, in the light of all the facts and circumstances in evidence, that Stevens, who had been ill for several years, was forced both in the past as in the present, to execute an operation in January, 1941, and had been attended daily by a doctor for two months before his death, knowingly and of his own free will executed a will a few hours before his death that omits to mention the woman who, according to his own statements, had been so helpful and kind to him that he did not know how he would have gone on living without her, and in the said will gave practically all of his estate to his nephew and niece, although he had stated to witnesses that his relatives had deserted him and had no interest in him. That Mrs. Longley played some part in having the dying man make a new will appears from the evidence. Stevens told Mrs. Longley that he had remembered plaintiff in his will, and Mrs. Longley testified that she said to Cameron, "I feel badly about it." Her answer to the question, whether she had any conversation with Stevens about the making of the will, "not anything in particular," shows that she did have some talk with him upon the subject. The attorney who drew the last will later appears as the attorney for Mrs. Longley and Mr. Stevens. It may well be that Stevens, who had been bedridden for nine years, his infirmities to plaintiff and had will her money in a number of codicils and a will, did not knowingly and of his own free will repudiate his contract with plaintiff. The evidence does

not show his mental and physical condition at the time he signed the will, although defendants called Dr. Cotts as a witness.

We find no merit in defendants' contention that the evidence does not prove plaintiff's claim that she fully performed the service that she agreed to perform. In addition to the evidence given by witnesses as to the services she rendered to Stevens, the codicils executed by Stevens from year to year tend to prove that he considered that she was performing her part of the contract.

Defendants contend that a "contract for personal care and attention cannot be specifically enforced unless such services have been fully performed and the circumstances are such that to deny specific performance would leave the party with an injury that could not be adequately compensated in damages." In support of this contention they cite Wagner v. Maxey, 206 Ill. App. 452, and Anderson v. Olsen, 188 Ill. 502, which follow the established rule that courts of equity do not sit for the purpose of entertaining bills the only object of which is to secure damages, and that equity will not decree specific performance of a contract which relates to personalty when compensation in damages furnishes a complete and satisfactory remedy. In the instant case the alleged agreement provided that if plaintiff rendered the services deceased would by his will provide for the payment therefor at the rate of \$1,000 per year. The master stated that he was convinced from the evidence that plaintiff performed the services to the day of the death of Stevens, March 10, 1943, or almost nine years. Defendants pleaded, among other defenses, the five year Statute of Limitations. In an action at law, that statute would bar all compensation for services rendered prior to March 11, 1938, or about four years. In Holsz v. Stephen, 362 Ill. 527, the



not show his mental and physical condition at the time he signed the will, although statements called Dr. Coffey as a witness.

It is no secret in the community that the evidence does not prove affirmatively that the will was performed by the service that she agreed to perform. In addition to the evidence given by witnesses as to the services she rendered to Stevens, the evidence presented by Stevens from year to year tend to prove that he considered that she was performing her part of the contract.

Defendants contend that a "contract for personal care and attention cannot be specifically enforced unless such services have been fully performed and the circumstances are such that to deny specific performance would leave the party with an injury that could not be adequately compensated in damages." In support of this contention they cite Wheeler v. Baker, 206 Ill. App. 45, and Wheeler v. Baker, 111 Ill. 202, which follow the established rule that courts of equity do not sit for the purpose of supervening, this the only effect of which is to remove the case, and that equity will not decree specific performance of a contract which relates to personally when compensation in damages is complete and satisfactory remedy. In the instant case the alleged agreement provided that if plaintiff rendered the services he would by his will provide for the payment thereof at the rate of \$1,000 per year. The master stated that he was convinced from the evidence that plaintiff performed the services to the day of the death of Stevens, March 10, 1945, or almost nine years. Defendants pleaded, among other defenses, the five year statute of limitations. In an action at law, that statute would bar all compensation for services rendered prior to March 11, 1938, or about four years. In Holas v. Tappan, 362 Ill. 527, the

court states (pp. 532, 533): "The remedy [specific performance] is afforded where the contract has been performed by one party in such a way that the parties cannot be placed in statu quo or damages awarded which would be full compensation. (Weir v. Weir, 287 Ill. 495; Koenig v. Dohm, 209 id. 468.) The performance relied upon must place the party who has performed in such a situation that it would be a fraud upon him if the agreement were not carried out.

(Nelson v. Nelson, 334 Ill. 43.) To take an oral promise which has been partly performed out of the statute, part performance must be such that a restoration of their previous condition is impracticable and a refusal to go on and complete the engagement would be a virtual fraud upon the parties.

(Shaver v. Wickwire, 335 Ill. 46; Stephens v. Collison, 313 id. 365.) The performance of personal services, the value of which may be estimated in money, or for which a recovery may be had at law, will not take the contract out of the statute, because the law affords an adequate remedy. It is only where the Statute of Limitations bars a recovery at law,

or where the improvements made or services performed cannot be adequately compensated at law, or where failure to carry out the agreement will amount to a fraud on the promisee, that specific performance will be decreed." (Italics ours.)

In Oswald v. Nehls, 233 Ill. 438 (cited by defendants), the court states (p. 446): "Contracts for personal care and attention or personal services cannot usually be enforced specifically. However, when personal care and attention or personal services have been fully performed, and the circumstances are such that to deny specific performance would leave the party with an injury that could not be adequately compensated in damages, equity will grant a specific performance



comparative in damages, and will grant a specific performance  
leave the party with an injury that could not be adequately  
satisfied by a return to the specific performance would  
personal services have been fully performed, and the dis-  
specifically. However, when personal care and attention or  
attention or personal services cannot actually be enforced  
court states (p. 440): "Performance for personal care and  
In Quinn v. Wells, 233 Ill. 431 (1914), it was held  
that specific performance will be decreed." (Illinois case.)  
out the agreement will amount to a fraud on the promisee,  
be adequately compensated at law, or there being no way to carry  
or where the improvements made or services performed cannot  
only where the rights of third parties have a recovery at law.  
statute, because the Illinois statute on who may recover at law  
may be read as law, will not take the contract out of the  
of which may be satisfied in money, or for which a recovery  
id. 361. The performance of personal services, the value  
(Quinn v. Wells, 233 Ill. 431, 432; Wells v. Quinn, 215  
the agreement would be a violation of public policy.  
condition is impracticable and a refusal to go on and complete  
performance must be such that a repetition of their previous  
which has been partly performed out of the statute, part  
(Wells v. Quinn, 215 Ill. 431, 432). To take an actual promise  
from upon him if the agreement were not carried out.  
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of which may be satisfied in money, or for which a recovery  
may be read as law, will not take the contract out of the  
statute, because the Illinois statute on who may recover at law  
only where the rights of third parties have a recovery at law.  
or where the improvements made or services performed cannot  
be adequately compensated at law, or there being no way to carry  
out the agreement will amount to a fraud on the promisee,  
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In Quinn v. Wells, 233 Ill. 431, 432 (1914), it was held  
court states (p. 440): "Performance for personal care and  
attention or personal services cannot actually be enforced  
specifically. However, when personal care and attention or  
personal services have been fully performed, and the dis-  
satisfied by a return to the specific performance would  
leave the party with an injury that could not be adequately  
comparative in damages, and will grant a specific performance

of the remaining provisions of the contract. Page on Contracts, sec. 1623, and cases therein cited." Other cases might be cited which hold that a contract such as the one at bar can be enforced in equity where the Statute of Limitations bars recovery at law or where failure to carry it out would be a fraud on the promisee.

Defendants contend that the decree ordered the payment of money and that this order was improper because a court of equity ~~cannot~~ has no jurisdiction to decree specific performance of the payment of money. As defendants failed to argue this contention we find it difficult to understand their position. The decree fixes plaintiff's compensation at \$8,853.72, which amount is compensation for plaintiff from the date of the agreement to the date of the death of Stevens at the rate provided for in the agreement, and it impresses a trust on all of the assets of the estate of Stevens, subject to the rights of creditors and the costs and expenses of administration, and the decree ordered the amount fixed to be paid in due course of administration. This was proper procedure. (See Ohlendiek v. Schuler, 299 Fed. 182.) Such a trust will be enforced against the heirs and personal representatives of the deceased. (Klussman v. Wessling, 238 Ill. 568; Whiton v. Whiton, 179 Ill. 32; Smith v. Smith, 340 Ill. 34, 38, 39.)

An able and experienced chancellor sustained the findings and conclusions of the master. We find ourselves in full accord with the actions of both.

The decree of the Circuit court of Cook county is a just one and it is affirmed.

DECREE AFFIRMED.

Sullivan, P. J., and Friend, J., concur.





Abstract

326 I.A. 449

GEN. NO. 10004

AGENDA NO. 3

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1945

ETHEL G. FIDLER,

APPELLEE,

vs.

JOHN KENNEDY, ESTELLE

KENNEDY, and EDITH P.

KENNEDY,

APPELLANTS.

APPEAL FROM THE CIRCUIT

COURT OF DUPAGE COUNTY.

HUFFMAN, J.

Appellants bring this appeal from order denying their motion to open up a judgment by confession and for a hearing on the merits. They purchased from appellee, twenty-two heifers at the price of \$3300; they gave their judgment note in said amount together with chattel mortgage on the cattle as security for the purchase price. The note was dated November 15, 1943; it provided for payment in monthly installments of \$125, per month, the first of such installments to become payable on January 10, 1944. On February 21,



2000. 10. 10

FROM THE DIRECTOR GENERAL OF THE BUREAU OF THE CENSUS

## LEARNING OBJECTIVES

15

1000, 1000, 1000

9. 1110 600, 1111

[illegible]

LA 1110

1. The first of these is the fact that the Government has not yet decided whether it will accept the offer of the United States to purchase the surplus stocks of the Government. The Government has not yet decided whether it will accept the offer of the United States to purchase the surplus stocks of the Government.

1944, appellee placed the note in judgment in the full amount against appellants.

Following entry of the judgment herein, appellants filed their motion, supported by affidavit, to open up said judgment and for leave to make defense on the merits. Appellee filed counter-affidavit thereto. It is the subject matter of appellants' affidavit filed in support of their motion which is the substance of this suit. If the same shall be considered sufficient as to the whole or a part of appellee's demand, then appellants should have the right to present their defense on the merits.

It is alleged in appellants' affidavit that the heifers were purchased as dairy cattle; that all parties so understood; that it was agreed they would shortly freshen; that they were in perfect health and sound physical condition; that they had been subjected to and passed all tests required to be made of cattle for dairy purposes; that appellants would be furnished official certificates as to each of said heifers with respect to the above tests; that a bill of sale would be delivered to appellants for said cattle; that the cattle were to be what is commonly termed, first calf dairy heifers; and that relying upon such guaranties and warranty, appellants so purchased said heifers.

The affidavit further states that when the heifers calved, it was discovered that they were afflicted with



1944, applied to the ... in the ...  
This ...  
Following entry of the ...  
and ...  
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thereof. It is ...  
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right to ...  
It is ...  
beliefs ...  
beliefs ...  
sincerely ...  
and ...  
subjected ...  
most of ...  
should be ...  
of ...  
that a ...  
The ...  
commonly ...  
relating ...  
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The ...  
derived, it ...

disease incident to cattle; that they had hard quarters; that they had hard or blind quarters; that twelve of said heifers came in with blind quarters, mastitis or aborted; that appellants made effort to obtain compliance from appellee with the terms of their transaction and an amicable settlement and adjustment with respect to the diseased cattle; that at the time the judgment was entered, \$250, was then due on the note; that during this time appellants had been attempting to negotiate with appellee with respect to securing some adjustment or settlement between them with respect to the matter; that no steps were taken by appellee to foreclose on the mortgage. It is alleged that no bill of sale was ever delivered. It is further alleged that no provision was incorporated in the note which provided for the acceleration of the payments of installments, but that the only authorization for the taking of judgment by confession was for such amount as was unpaid at the time of entry of any such judgment; and that the only provision with respect to the right of appellee upon default in payment of any installment, was to take judgment for the amount then due, and the further right to foreclose the chattel mortgage securing payment of the note.

While the above expressions do not appear in the affidavit in identical language, yet we cannot undertake to incorporate the entire affidavit herein. Such defenses are set forth. We find no express provision in the note





accelerating the unpaid balance at the time of any default in installment. However, the note incorporates a warrant of attorney to confess judgment for such amount as may appear to be unpaid.

Appellee by counter-affidavit, denied allegations of appellants' affidavit which were directed toward issues of fact, going to the merits of the matter. Counter-affidavits which go to questions of fact raised on the merits should not be considered as controlling on motion to open a judgment by confession and for leave to defend. *Stranak v. Tomasovic*, 309 Ill. App. 177, 181. Rule 26 of the Supreme Court, relative to this situation, provides that the complaint, motion and affidavit, and counter-affidavits, shall constitute the pleadings, unless the parties secure leave to file further pleadings. This rule recognizes that issues of fact raised by the affidavit and counter-affidavit, going to the merits of the controversy, are to be thus formed and trial had thereon.

We are of the opinion the affidavit of appellants was sufficient. The order of the trial court denying the motion is reversed, and the cause remanded with directions to open up the judgment to permit appellants to present their defense on the merits.

Reversed and remanded with directions.





545  
326  
Gen. No. 10005.

1743A  
Agenda No. 4.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
FEBRUARY TERM, A. D. 1945.

326 I.A. 450'

C. H. RAMSEY,	)	
Plaintiff-Appellant,	)	
	)	Appeal from
vs.	)	County Court
	)	Kankakee County.
STANLEY A. BOWLBY,	)	
Defendant-Appellee.	)	

WOLFE,-- J.

The plaintiff, C. H. Ramsey, started a suit in attachment against the defendant, Stanley A. Bowlby, in the Circuit Court in Kankakee County, Illinois. The writ was duly served by attaching certain interests in the real estate in said county owned by the defendant. There is no question raised as to the legality of the attachment proceedings. The only defense made is one of liability upon the note involved in this suit.

The plaintiff filed his complaint declaring upon a certain non-negotiable note in the principal sum of \$1,500.00, and interest thereon, at the rate of 6% per annum from April 29, 1940. He alleged that no part of the note was paid, and claimed damages against the defendant in the sum of \$1,755.50. A copy of the note was attached to the complaint.



22

STATE OF ILLINOIS, COUNTY OF COOK, JUDICIAL CIRCUIT

IN SENATE, JANUARY 1, 1900.  
REPORT OF THE COMMISSIONERS OF THE LAND OFFICE  
IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE  
JANUARY 1, 1900.

REPORT OF THE COMMISSIONERS OF THE LAND OFFICE  
IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE  
JANUARY 1, 1900.

THE COMMISSIONERS OF THE LAND OFFICE, COOK COUNTY, ILLINOIS, have the honor to acknowledge the receipt of a resolution passed by the Senate of the State of Illinois, January 1, 1900, relative to the report of the Commissioners of the Land Office, and in response to the same, to submit herewith a report of the Commissioners of the Land Office, Cook County, Illinois, for the year ending December 31, 1900.

The report of the Commissioners of the Land Office, Cook County, Illinois, for the year ending December 31, 1900, is divided into two parts, the first part containing a statement of the lands owned by the State of Illinois, and the second part containing a statement of the lands owned by the County of Cook, Illinois.

The first part of the report contains a statement of the lands owned by the State of Illinois, and is divided into two sections, the first section containing a statement of the lands owned by the State of Illinois, and the second section containing a statement of the lands owned by the County of Cook, Illinois.

The second part of the report contains a statement of the lands owned by the County of Cook, Illinois, and is divided into two sections, the first section containing a statement of the lands owned by the County of Cook, Illinois, and the second section containing a statement of the lands owned by the State of Illinois.

A copy of the report was attached to the resolution of the Senate, and is herewith submitted.

2.

The defendant filed his answer in which he admitted the execution of the note, but denied that it bore any interest. He admitted that the plaintiff was the holder and owner of the note. He denied that he was indebted to the plaintiff in any sum whatsoever; and for a further defense, he alleges that there was no consideration of any kind whatsoever for the execution and delivery of the instrument set forth in the complaint, because, that, on or about the 10th day of December, 1939, he,-- then the sole proprietor of a store known as "Bowlby's Market", located at 3801 Wyoming Street in St. Louis, Missouri,-- entered into an oral agreement with the plaintiff, C. H. Ramsey, whereby said plaintiff agreed to pay \$1,500.00 for a half interest in said business, which business was to be an equal partnership consisting of the plaintiff and the defendant. The money furnished by the plaintiff was to be used by the defendant in increasing the stock and fixtures of the store and said sum of \$1,500.00 was sent to the defendant by the plaintiff on or about the 13th day of December, 1939 and was received by the defendant and used by him for the purpose theretofore agreed upon. He alleges that it had been agreed by and between the plaintiff and the defendant that the proceeds of the business were to be divided equally and that the partners were equally liable for the debts incurred during the operation of the business; that in the spring of 1940 the business ceased to prosper and it became necessary to liquidate the same; that





3.

pending liquidation the plaintiff gave to the defendant a non-negotiable note in form substantially the same as "Exhibit A" attached to the complaint to serve as a memoranda of the interest in the business owned by the plaintiff; that at the time the note was executed it was anticipated that the stock and fixtures would sell for sufficient amount to pay all debts and to leave a surplus to be divided between the plaintiff and defendant as partners.

The case was tried before the Court without a jury. He found the issues in favor of the defendant, and dissolved the attachment proceeding, and assessed the costs against the plaintiff. It is from this judgment that the plaintiff has perfected an appeal to this Court.

There is very little dispute as to the facts. It is agreed that the plaintiff paid to the defendant \$1,500.00 cash for one-half interest in his business in St. Louis, Missouri; that this money was to be used for improvements and stock in the store; that the plaintiff's son was to be hired as a clerk in the store; that he was so hired for a short time. The business was unprofitable and within a few months it was discontinued.

There has never been a settlement between the plaintiff and the defendant of the assets of this venture. The abstract contains the opinion of the trial court in which he found that there was a partnership formed between the plaintiff and the defendant, and that there was no consideration given for the note in question. Appellee seriously contends that the agreement





4.

should not be construed, as being a completed partnership, but at the most it was only an agreement to form a partnership on certain conditions. We cannot agree with this contention, as we think the evidence clearly shows that there was a completed partnership between the parties. There has never been a settlement of the partnership assets. We think that the trial court properly held that there was no consideration for this note, and the judgment should be affirmed.

Judgment affirmed.



should not be considered, as being a completed document, but  
as being only a draft or preliminary, and as such, it is not  
binding. It is merely a statement of the facts, and is not  
to be taken as a final decision. It is only a statement of  
the facts, and is not to be taken as a final decision. It is  
only a statement of the facts, and is not to be taken as a  
final decision. It is only a statement of the facts, and is  
not to be taken as a final decision. It is only a statement  
of the facts, and is not to be taken as a final decision.  
and the judgment should be official.

Respectfully,  
[Signature]

42934

EDWARD J. DREGOI,  
Appellant,

v.

JOHN HANCOCK MUTUAL LIFE  
INSURANCE COMPANY,  
Appellee.

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

326 I.A. 450<sup>2</sup>

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Edward J. Dregoi, as a former policyholder and member of the John Hancock Mutual Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the John Hancock Mutual Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.



1034

EDWARD J. HENDEL  
Plaintiff,

v.

JOHN HANCOCK LIFE INSURANCE COMPANY  
Defendant.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY,

32614-150

THE FOLLOWING VERIFICATION WAS FILED WITH THE CLERK OF THE COURT.

Plaintiff, Edward J. Hendel, as a former policyholder and member of the John Hancock Mutual Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the John Hancock Mutual Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Para. 10) and 172, Chap. 110, Ill. Rev. Stat. 1943) and the Chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this

order.

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.



The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit Court dismissing this cause for want of equity is affirmed.

ATTEST:

Friend and Seaman, J., concur.

42935

326 I.A. 451

MORRIS SINGER,

Appellant,

v.

MUTUAL LIFE INSURANCE COMPANY  
OF NEW YORK, a corporation,  
Appellee.

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Morris Singer, as a former policyholder and member of the Mutual Life Insurance Company of New York, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the Mutual Life Insurance Company of New York might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.



3281.A.451

42335

THOMAS W. H. COURT  
COURT, COOK COUNTY

WILLIAM S. H. COURT  
OF NEW YORK, a corporation,  
Appellant,  
v.  
MUTUAL LIFE INSURANCE COMPANY  
OF NEW YORK, a corporation,  
Appellee.

MR. PRESIDING JUSTICE CULLIN DELIVERED THE OPINION OF THE COURT.  
Plaintiff, Thomas H. Court, as a former policyholder and member of the Mutual Life Insurance Company of New York, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged Plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the Mutual Life Insurance Company of New York might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss Plaintiff's complaint on several grounds pursuant to Sections 45 and 46 of the Civil Practice Act (Term, 190 and 192, Chap. 110, Ill. Rev. Stat. 1903) and the Chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.



The appeal in this case was consolidated for hearing

in this court with appeals heard in sixteen other

cases, including case No. 4293. The opinion in case

No. 4293 is filed concurrently with this opinion. The

allegations of Plaintiff's complaint and the grounds asserted

in defendant's motion for dismissal in this case are practically

identical with the allegations of the complaint and the grounds

asserted in the defendant's motion to dismiss in case No. 4293.

The final order of dismissal entered in this case was the same

as in this case and the same questions were presented for review.

One question in this case (*Smith v. The People*) is whether

the constitutionality of the law is controlling as to the questions

presented here and for the reasons stated therein the final

order of the circuit court dismissing this case for want of

equity is affirmed.

THOMAS.

THOMAS and BERNARD, JJ., concur.

42936

JOHN CAMINKER,  
Appellant,

v.

NEW YORK LIFE INSURANCE  
COMPANY, a corporation,  
Appellee.

326 L.A. 451<sup>2</sup>

)  
) APPEAL FROM CIRCUIT  
) COURT, COOK COUNTY.  
)  
)  
)

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT

Plaintiff, John Caminker, as a former policyholder and member of the New York Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the New York Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.



JOHN CANNON, Plaintiff,  
 v.  
 NEW YORK LIFE INSURANCE COMPANY, a corporation, Defendant.

STATE OF NEW YORK  
 COUNTY OF NEW YORK

MR. JUSTICE JAMES M. SMITH delivered the opinion of the court.

Plaintiff, John Cannon, as a former policyholder and member of the New York Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the said all former policyholders of the New York Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff objecting to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.



The appeal in this case was consolidated for hearing in this court with appeals perfected in thirteen other cases, including case no. 42933. The opinion in case no. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case no. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case, Smith v. The Mutual Life Assurance Society of the United States, is controlling as to the questions presented here and for the reasons stated therein the final order of the circuit court dismissing this cause for want of equity is affirmed.

W. H. L.

Friend and Son, Inc., counsel.

42937

326 I.A. 452

LOUIS A. FOSSE,  
Appellant,

v.

NATIONAL LIFE INSURANCE  
COMPANY, a corporation,  
Appellee.

)  
)  
) APPEAL FROM CIRCUIT COURT,  
)  
) COOK COUNTY.  
)

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Louis A. Fosse, as a former policyholder and member of the National Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the National Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustain the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

The appeal in this case was consolidated for hearing



3281.A.452

42337

APPEAL FROM CIRCUIT COURT

CASE NO. 1000

LOUIS A. ROSS, Appellant,

v.

NATIONAL LIFE INSURANCE COMPANY, a corporation, Appellee.

MR. PRESIDING JUDGE BULLOCK DELIVERED THE OPINION OF THE COURT.

Plaintiff, Louis A. Ross, as a former policyholder and

member of the National Life Insurance Company, brought this suit

in equity against said insurance company on his own behalf and

on behalf of all other former policyholders in the defendant

company who were similarly situated and whom he claimed to

represent. The complaint alleged plaintiff's right and the

right of the other former policyholders to share in the

"contingency reserve" fund of the defendant company which had

accrued during the time their policies were in force and prayed

for an accounting and an order of distribution to the end that

all former policyholders of the National Life Insurance Company

might be paid from its "contingency reserve" fund the amounts

they respectively contributed thereto through their payment of

premiums before they voluntarily allowed their policies to

lapse for nonpayment of premiums or had surrendered them for

their cash value or the equivalent thereof in the form of term,

extended or paid-up insurance. Defendant filed a motion to

dismiss plaintiff's complaint on several grounds pursuant to

Sections 45 and 48 of the Civil Practice Act (Stats. 1901, 1902 and

1903, Chap. 110, Ill. Rev. Stat. 1903) and the chancellor sustained

the motion. Plaintiff electing to stand on his complaint, a

final order was entered dismissing this case for want of equity.

Plaintiff appeals from this order.

The appeal in this case was consolidated for hearing

-2-

in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.



in this court with appeals presented in fifteen other cases, including case No. 42933. On appeal in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the facts asserted in defendant's motion for dismissal in this case are substantially identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case, Smith v. The Republic Life Insurance Society of the United States, is controlling as to the questions presented here and for the reasons stated therein the final order of the circuit court dismissing this case for want of equity is affirmed.

AFFIRMED.

TRIMBLE and BOONER, JJ., concur.

42938

326 I.A. 452<sup>2</sup>

SIMON L. BERNSTEIN,  
Appellant,

v.

SECURITY MUTUAL LIFE INSURANCE  
COMPANY, a corporation,  
Appellee.

)  
) APPEAL FROM CIRCUIT  
) COURT, COOK COUNTY.  
)  
)  
)

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Simon L. Bernstein, as a former policyholder and member of the Security Mutual Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the Security Mutual Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

ALFRED E. BERNSTEIN,  
Appellant,  
v.  
UNITED STATES LIFE INSURANCE COMPANY,  
a corporation,  
appellee.

1. Responding to the summons served on the appellant, the appellant, Alfred E. Bernstein, as a former policyholder and member of the Security Mutual Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and who he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and proved for an accounting and an order of distribution to him and that all former policyholders of the Security Mutual Life Insurance Company might be paid from the "contingency reserve" fund the amounts they respectively contributed thereto toward their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Plaintiff filed a motion to dismiss defendant's complaint on several grounds pursuant to Sections 43 and 44 of the Civil Practice Act (Pars. 109 and 112, Chap. 110, III, Stat. 1943) and the Chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.



The appeal in this case was consolidated for hearing in this court with appeals brought in certain other cases, including case No. 4733. The opinion in case No. 4733 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are precisely identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 4733. The final order of dismissal entered in this case was the same as in this case and the same questions were presented for review. Our decision in this case (Smith v. The Trustees of the University of the District of Columbia) is controlling as to the questions presented here and for the reasons stated therein the final order of the district court dismissing this case for want of equity is affirmed.

ATTORNEYS

Friend and family, Mr. Smith

42939

DAVID H. CAPLOW,  
Appellant,

v.

THE PRUDENTIAL INSURANCE  
COMPANY OF AMERICA, a  
corporation,  
Appellee.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

326 L.A. 453

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, David H. Caplow, as a former policyholder and member of the Prudential Insurance Company of America, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the Prudential Insurance Company of America might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.



DAVID H. GATSON,  
Appellant,

v.

THE PRUDENTIAL INSURANCE  
COMPANY OF AMERICA,  
Corporation,  
Appellee.

FEDERAL DISTRICT COURT,

DOOR COUNTY,

3861 A. 438

THE FOLLOWING ORDER WAS ENTERED BY THE COURT ON THE 10TH DAY OF

DECEMBER, 1943, IN CASE NO. 10,000, IN WHICH DAVID H. GATSON, PLAINTIFF,

VS. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, DEFENDANT,

PLAINTIFF BROUGHT THIS SUIT IN EQUITY AGAINST SAID DEFENDANT COMPANY

ON HIS OWN BEHALF AND ON BEHALF OF ALL OTHER FORMER POLICY-

HOLDERS IN THE DEFENDANT COMPANY WHO WERE SIMILARLY AFFECTED

AND WHOSE NAMES ARE LISTED IN THE ATTACHED LIST.

PLAINTIFF'S RIGHT AND THE RIGHT OF THE OTHER FORMER POLICY-

HOLDERS TO SHARE IN THE "CONTINGENCY RESERVE" FUND OF THE

DEFENDANT COMPANY WHICH HAD ACCUMULATED DURING THE TIME THEIR

POLICIES WERE IN FORCE AND TRUSTED FOR AN ACCOUNTING AND AN

ORDER OF DISTRIBUTION TO THE SAID ALL FORMER POLICYHOLDERS

OF THE PRUDENTIAL INSURANCE COMPANY OF AMERICA MIGHT BE MADE

FROM THE "CONTINGENCY RESERVE" FUND AND THE AMOUNTS THEY RESPECTIVE-

LY CONTRIBUTED THERETO THROUGH THEIR PAYMENT OF PREMIUMS BEFORE

THEY VOLUNTARILY ALLOWED THEIR POLICIES TO LAPSE FOR NONPAYMENT

OF PREMIUMS OR HAD SURRENDERED THEM FOR THEIR CASH VALUE OR

THE EQUIVALENT THEREOF IN THE FORM OF LOAN, EXTENDED OR PAID-UP

INSURANCE. DEFENDANT FILED A MOTION TO DISMISS PLAINTIFF'S

COMPLAINT ON SEVERAL GROUNDS PERTAINING TO SECTIONS 17 AND 48

OF THE CIVIL PRACTICE ACT (PARA. 107 AND 108, CHAP. 110, ILL.

REV. STAT. 1943) AND THE CHANCELLER SUSTAINED THE MOTION.

PLAINTIFF ELECTING TO STAND ON HIS COMPLAINT, A FINAL ORDER

WAS ENTERED DISMISSING THIS CASE FOR WANT OF EQUITY. PLAINTIFF

HEREBY APPEALS FROM THIS ORDER.

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.



The appeal in this case was consolidated for hearing in this court with appeals presented in sixteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Smith v. The White Life Insurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the circuit court dismissing this case for want of equity is affirmed.

ATTORNEY

Wright and Company, W. J. Connor,

42940

IRWIN JACK HOLDEN,

Appellant,

v.

HOME LIFE INSURANCE COMPANY,

Appellee.

331  
APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

326 I.A. 453<sup>2</sup>

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Irwin Jack Holden, as a former policyholder and member of the Home Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the Home Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed there- to through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.



THIS LAST PARAGRAPH,

appears,

v.

WOMEN LIKE THOSE WHOSE NAMES ARE

appears.

AT THE SAME TIME, THE COURT HAS TO CONSIDER THE INTERESTS OF THE WOMEN.

Finally, the court must also consider the interests of the men.

Under the terms of the law, the court must consider the interests of the men.

This is not in equity, and the court must consider the interests of the men.

Under the terms of the law, the court must consider the interests of the men.

Under the terms of the law, the court must consider the interests of the men.

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Under the terms of the law, the court must consider the interests of the men.

Under the terms of the law, the court must consider the interests of the men.

APPEAL FROM CIRCUIT COURT

IN THE CIRCUIT COURT

854 A. 458

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.



The object of this bill is to provide for the  
in this country which is to be established in  
including some of the most important of these  
consequently with the object of the bill is to  
provide for the establishment of a new system of  
education in this country which is to be  
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which is to be established in this country and  
this bill is to be established in this country.

THE

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42941

326 I.A. 454

EDWARD K. STACKLER,  
Appellant,

v.

NEW ENGLAND MUTUAL LIFE  
INSURANCE COMPANY, a corporation,  
Appellee.

)  
)  
) APPEAL FROM CIRCUIT  
)  
) COURT OF COOK COUNTY.  
)

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Edward K. Stackler, as a former policyholder and member of the New England Mutual Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the New England Mutual Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.



8261A-454

4541

WILLIAM E. BRADLEY,  
Plaintiff,

v.

THE NEW YORK LIFE INSURANCE COMPANY,  
Defendant.

COURT OF CHANCERY,  
CITY OF NEW YORK.

IN SENATE, JUNE 1, 1943.

Plaintiff, William E. Bradley, as a former policyholder

and member of the New York Life Insurance Company,

presented this suit in equity against said insurance company on

his own behalf and on behalf of all other former policyholders

in the defendant company who were similarly situated and whom

he claimed to represent. The complaint alleged plaintiff's

right and the right of the other former policyholders to share

in the "contingency reserve" fund of the defendant company

which had accrued during the time their policies were in force

and prayed for an accounting and an order of distribution to

the end that all former policyholders of the New York Life

Life Insurance Company might be paid from the "contingency

reserve" fund the amounts they respectively contributed thereto

through their payment of premiums before they voluntarily allowed

their policies to lapse for nonpayment of premiums or had

surrendered them for their cash value or the equivalent thereof

in the form of term, extended or paid-up insurance. Defendant

filed a motion to dismiss plaintiff's complaint on several

grounds pursuant to Sections 47 and 48 of the Civil Practice

Act (Laws, 1936, Chap. 113, § 47, and Laws, 1943, Chap. 113, § 48).

The chancellor sustained the motion. Plaintiff appealed to

stand on his complaint, a final order was entered dismissing

this case for want of equity. Plaintiff appeals from this

order.

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.



The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 40933. The opinion in case No. 40933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 40933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (United States Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the circuit court dismissing this cause for want of equity is affirmed.

REVEREND,

Friend and Comrade, U. S. Attorney,

42942

WILLIAM H. KRUSPE,

Appellant,

v.

BANKERS LIFE COMPANY,

Appellee.

32014-54<sup>2</sup>  
APPEAL FROM THE CIRCUIT COURT  
OF COOK COUNTY. m 3/5

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, William H. Kruspe, as a former policyholder and member of the Bankers Life Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the Bankers Life Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed



43242

WILLIAM H. KENNEDY,  
Plaintiff,  
v.  
BANKERS LIFE COMPANY,  
Defendant.

MR. JUSTICE JUDITH SULLIVAN delivered the opinion of the court.  
Plaintiff, William H. Kennedy, as a former policyholder and member of the Bankers Life Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and played in an accounting and an order of distribution to the end that all former policyholders of the Bankers Life Company might be paid from its "contingency reserve" fund the amounts they proportionately contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for non-payment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Laws 189 and 191, Chap. 110, III. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff elected to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.  
The appeal in this case was consolidated for hearing in this court with appeals presented in eighteen other cases, including case No. 43235. The opinion in case No. 43235 is filed

concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.



concurrently with this motion. The allegations of Plaintiff's

complaint and the grounds asserted in Defendant's motion for

dismissal in this case are practically identical with the allegations

of the complaint and the grounds asserted in the Defendant's motion

to dismiss in case No. 11332. The final order of dismissal entered

in that case was the same as in this case and the same questions

were presented for review. Our decision in that case (Smith v.

The American Life Insurance Society of the United States) is

controlling as to the questions presented here and for the reasons

stated therein the final order of the Circuit Court affirming

this case for want of equity is affirmed.

APPROVED:

Friend and Son, U.S. Circuit Court.

42943

JOHN H. ERBY,  
Appellant,

v.

PENN MUTUAL LIFE INSURANCE  
COMPANY, a corporation,  
Appellee.

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

326 I.A. 455

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, John H. Erby, as a former policyholder and member of the Penn Mutual Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the Penn Mutual Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.



1944

JOHN H. ...  
Appellant,

...  
Respondent.

3201 A. 455

... THE COURT.

Plaintiff, John H. ... as a former policyholder and  
 member of the firm Mutual Life Insurance Company, brought this  
 suit in equity against said insurance company on his own behalf  
 and on behalf of all other former policyholders in the defendant  
 company who were similarly situated and who he claimed to  
 represent. The complaint alleged Plaintiff's right and the  
 right of the other former policyholders to share in the  
 "contingency reserve" fund of the defendant company which  
 had accrued during the time their policies were in force  
 and prayed for an accounting and an order of allocation  
 to the end that all former policyholders of the firm Mutual  
 Life Insurance Company might be paid their share of the "contingency  
 reserve" fund the amounts they respectively contributed  
 thereto through their payment of premiums before they  
 voluntarily allowed their policies to lapse for nonpayment  
 of premium or had any reason for their lapse and value  
 on the equivalent thereof in the form of cash, extended or  
 paid-up insurance. Defendant filed a motion to dismiss plain-  
 tiff's complaint on several grounds presented in sections 45  
 and 46 of the Civil Practice Act (Civil Law and Code, §§ 45,  
 Ill. Rev. Stat. 1943) and the Chancellor sustained the  
 motion. Plaintiff electing to stand on his complaint, a  
 final order was entered dismissing this case for want of  
 equity. Plaintiff appeals from this order.

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.



The appeal in this case was consolidated for hearing in this court with several appeals filed in different years, including case No. 4731. The opinion in case No. 4731 is this court's opinion in this case. The allegations of plaintiff's complaint are the grounds asserted in defendant's motion for dismissal in this case and are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss the case No. 4731. The final order of dismissal entered in this case and the case in this case and the case No. 4731 are the same and the same reasons are given for the dismissal in that case (Case No. 4731). The defendant's motion for dismissal (Case No. 4731) is controlling as to the grounds presented here and the reasons stated therein the final order of the court are not changing this case for want of equity is affirmed.

AFFIRMED.

WILLIAM H. HARRIS, J., concur.

42944

WATSON A. SIMMONDS,  
Appellant,

v.

STATE MUTUAL LIFE INSURANCE  
COMPANY, a corporation,  
Appellee.

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

326 I.A. 455

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Watson A. Simmonds, as a former policyholder and member of the State Mutual Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the <sup>defendant</sup> company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the State Mutual Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.



WATSON A. SIMMONS  
Plaintiff

STATE MUTUAL LIFE INSURANCE  
COMPANY, a corporation  
Appellee

APPEAL FROM CIRCUIT COURT,

COOK COUNTY,

8261A.455

MR. JUSTICE DELIVERED THE OPINION OF THE COURT.

Plaintiff, Watson A. Simmons, as a former policyholder and member of the State Mutual Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the company which had accrued during the time their policies were in force and proved for an accounting and an order of distribution to the end that all former policyholders of the State Mutual Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premium or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to sections 45 and 46 of the Civil Practice Act (Pars. 16 and 17, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.



The appeal in this case was consolidated for hearing in this court with appeals docketed in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Smith v. The Pacific Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the circuit court dismissing this case for want of equity is affirmed.

AFFIRMED.

Trinity and Graham, J. J. Conover.

42945

3261.A.456<sup>1</sup>

WALTER F. JONES,

Appellant,

v.

ACACIA MUTUAL LIFE INSURANCE COMPANY,  
a corporation,

Appellee.

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Walter F. Jones, as a former policyholder and member of the Acacia Mutual Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the Acacia Mutual Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.



3361A.458

49946

WALTER F. JONES

Appellant

v.

ASSOCIATED LIFE INSURANCE COMPANY,  
a corporation

Appellee

WALTER F. JONES

Appellant

MR. JAMES H. HARRIS, ATTORNEY AT LAW, FOR THE PLAINTIFF

Plaintiff, Walter F. Jones, was a former policyholder and member of the Assaia Mutual Life Insurance Company, through this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in said defendant company to whom similarly situated and whom he claims to represent. The complaint alleges plaintiff's right and the right of the other former policyholders to share in the company reserve fund of the defendant company which had accrued during the time their policies were in force and were for an accounting and an order of distribution to the said fund all former policyholders of the Assaia Mutual Life Insurance Company might be paid from the "contingency reserve" fund the amount they respectively contributed thereto through their payment of premiums before they voluntarily altered their policies to lapse for nonpayment of premium or had surrendered them for their cash value or the equivalent thereof to the company, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 43 and 45 of the Civil Practice Act (Part. 100 and 101, Chap. 110, Sec. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.



The appeal in this case was consolidated for hearing in this court with appeals reported in fifteen other cases, including case No. 43237. The opinion in case No. 43237 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 43237. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Smith v. The Pacific Life Insurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the district court dismissing this case for want of equity is affirmed.

APPROVED

Friend and Counsel, U.S. Circuit Court.

42946

326 I.A. 456<sup>2</sup>

ARTHUR J. SCHNASE,

Appellant,

v.

PHOENIX MUTUAL LIFE INSURANCE  
COMPANY, a corporation,

Appellee.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

33

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Arthur J. Schnase, as a former policyholder and member of the Phoenix Mutual Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the Phoenix Mutual Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.



REMARKS. 3. HULL.

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11. In fact, there is a lot of evidence that the

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.



The appeal in this case was consolidated for hearing in this court with appeals brought in sixteen other cases, including case no. 42900. The opinion in case no. 42900 is filed concurrently with this opinion. The allegations of Plaintiff's complaint and the evidence asserted in defendant's motion for dismissal in this case are factually identical with the allegations of the complaint and the evidence asserted in the defendant's motion for dismissal in case no. 42900. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Smith v. The Kentucky Life Insurance Society of the United States) is controlling as to the questions presented here and the reasons stated therein for the final order of the Circuit Court dismissing this case for want of equity is affirmed.

ATTORNEY.

WILLIAM AND COMPANY, JR., COUNSEL.

42947

EDWARD ALTMAN,

Appellant,

v.

METROPOLITAN LIFE INSURANCE COMPANY,  
a corporation,

Appellee.

338 A  
APPEAL FROM CIRCUIT  
COURT, COOK COUNTY.

3261A. 457

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Edward Altman, as a former policyholder and member of the Metropolitan Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the Metropolitan Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.



EDWARD ALLEN

Appellant,

v.

THE METROPOLITAN LIFE INSURANCE COMPANY,  
a corporation.

Appellee.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

8261 A. 452

THE FOLLOWING OPINION WAS DELIVERED BY THE COURT.

Plaintiff, Edward Allen, as a former policyholder and member of the Metropolitan Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and payable for an accounting and an order of distribution to the end that all former policyholders of the Metropolitan Life Insurance Company might be paid from the "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 46 of the Civil Practice Act (Para. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff elected to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.



The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 4293. The opinion in case No. 4293 is filed concurrently with this opinion. The allegations of the complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 4293. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. The decision in that case (People v. The People's Life Insurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit Court sustaining this case for want of equity is affirmed.

REVEREND,

Friend and Countryman, Wm. L. ...

42948

CLARENCE D. SHOCKLEY,

Appellant,

v.

MUTUAL BENEFIT LIFE INSURANCE  
COMPANY, a corporation,

Appellee.

334 A  
) APPEAL FROM CIRCUIT COURT,

) COOK COUNTY.  
)

26 I.A. 457<sup>2</sup>

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Clarence D. Shockley, as a former policyholder and member of the Mutual Benefit Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the Mutual Benefit Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.



WILLIAM H. WOODWARD,

Attorney,

v.

MILWAUKEE LIFE INSURANCE  
COMPANY, a corporation,

Defendant.

WILLIAM H. WOODWARD,

Attorney,

vs.

MILWAUKEE LIFE INSURANCE COMPANY, a corporation,

Plaintiff, Clarence E. Woodbury, as a former policy-

holder and member of the Mutual Benefit Life Insurance Company,

against this suit in equity against said insurance company on

his own behalf and on behalf of all other former policyholders

in the defendant company who were similarly situated and upon

his claim to represent. The complaint alleges plaintiff's

right and the right of the other former policyholders to share

in the "contingency reserve" fund of the defendant company which

had accrued during the time their policies were in force and

payable for an accounting and an order of distribution to the

end that all former policyholders of the Mutual Benefit Life

Insurance Company shall be paid from the "contingency reserve"

fund the amounts they respectively contributed thereto through

their payment of premiums before they voluntarily allowed their

policies to lapse for nonpayment of premiums or had surrendered

them for their cash value or the equivalent thereof in the form

of loans, extended or paid-up insurance. Defendant filed a motion

to dismiss plaintiff's complaint on several grounds pursuant

to Sections 43 and 45 of the Civil Procedure Act (Stats. 1933 and

1935, Chap. 110, Ill. Rev. Stat. 1945) and the chancellor sustained

the motion. Plaintiff moving to stand on his complaint, a

final order was entered dismissing this case for want of equity.

Plaintiff appeals from this order.

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.



The appeal in this case was consolidated for hearing in this court with appeals presented in thirteen other cases, including case No. 42823. The opinion in case No. 42823 is filed concurrently with this opinion. The allegations of the plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion for dismissal in case No. 42823. The final order of dismissal entered in this case was the same as in this case and the same questions were presented for review. Our decision in this case (Case No. 42823) is controlling as to the questions presented here and for the reasons stated therein the final order of the circuit court dismissing this case for want of equity is affirmed.

WILLIAM

WILLIAM and ELEANOR, JR., counsel.





JOHN E. JENKINS

Appellant

v.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, a corporation

Defendant

Filed for Court Clerk

3261.A.458

W. J. JENKINS, JAMES E. JENKINS and THE DIVISION OF THE COURT

Plaintiff, James E. Jenkins, as a former policyholder and member of the Northwestern Mutual Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. He complained against defendant's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and sought for an accounting and an order of distribution to the end that all former policyholders of the defendant Northwestern Mutual Life Insurance Company might be paid from the "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value at the equivalent thereof in the form of cash, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 43 and 44 of the Civil Practice Act (Code of Civil Procedure, Chap. 110, Ill. Rev. Stat. 1905) and the corporation maintained the motion. Plaintiff elected to stand on his own merits, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

The appeal in this case was consolidated for hearing with this court with appeals perfected in sixteen other cases,

cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, J.J., concur.



cases, including case No. 42833. The opinion in case No. 42833  
is filed concurrently with this opinion. The allegations of  
plaintiff's complaint and the grounds asserted in defendant's  
motion for dismissal in this case are practically identical with  
the allegations of the complaint and the grounds asserted in the  
defendant's motion to dismiss in case No. 42833. The final  
order of dismissal entered in that case was the same as in this  
case and the same questions were presented for review. Our  
decision in that case (Lucas v. The Equitable Life Assurance  
Society of the United States) is controlling as to the questions  
presented here and for the reasons stated therein the final  
order of the Circuit Court dismissing this case for want of  
equity is affirmed.

WYOMING.

WYOMING, J. J., concur.

42950

December Term, 1943

MAX A. GOLDSMITH,

Appellant,

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE  
COMPANY, a corporation,

Appellee.

Appeal from Cook Circuit.

3234 A. 4582

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Max A. Goldsmith, as a former policyholder and member of the Massachusetts Mutual Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the Massachusetts Mutual Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for non-payment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently



October Term, 1943

WAX A. GOLDBERG

Appellant

v.

ASSOCIATED MUTUAL LIFE INSURANCE COMPANY, INCORPORATED

Appellee

Appeal from Cook Circuit

32614.138

WAX A. GOLDBERG, Plaintiff, vs. ASSOCIATED MUTUAL LIFE INSURANCE COMPANY, INCORPORATED, Defendant.

Plaintiff, Wax A. Goldberg, as a former policyholder

and member of the Associated Mutual Life Insurance Company,

brought this suit in equity against said insurance company on his

own behalf and on behalf of all other former policyholders in the

defendant company who were similarly situated and who he claimed

to represent. The complaint alleged Plaintiff's right and the

right of the other former policyholders to share in the "earn-

ings reserve" fund of the defendant company, which had received

during the time their policies were in force and payable for an

accounting not in order of distribution to him and that all former

policyholders of the Associated Mutual Life Insurance Company

might be paid from the "contingency reserve" fund and amounts they

respectively contributed through their payment of premiums

before they voluntarily allowed their policies to lapse for non-

payment of premiums or had surrendered their policies cash value

or the equivalent thereof in the form of cash, annuities or paid-up

insurance. Defendant filed a motion to dismiss Plaintiff's com-

plaint on several grounds, among which were that as of the

date of filing of the complaint, Plaintiff was not entitled to stand

in his complaint, a final order was entered dismissing this case for

want of equity. Plaintiff appeals from this order.

The appeal in this case was consolidated for hearing in

this court with appeals perfected in thirteen other cases, including

case no. 42350. The opinion in case no. 42350 is filed concurrently

with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, J.J., concur.



with this opinion. The allegations of Plaintiff's complaint and the facts asserted in defendant's motion for judgment in this case are practically identical with the allegations of the com-

plaint and the facts asserted in the defendant's motion for judgment in case No. 42821. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case *Wright v.*

The Southern Life Insurance Society of the United States, is

controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit Court dismissing this case for want of equity is affirmed.

APPROVED:

Chief and Associate, U.S. Circuit Court.

42951

December Term, 1943

SAMUEL J. BENNETT,

Appellant,

v.

MINNESOTA MUTUAL LIFE INSURANCE  
COMPANY, a corporation,

Appellee.

Appeal from Cook Circuit.

3261 A. 459

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Samuel J. Bennett, as a former policyholder and member of the Minnesota Mutual Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the Minnesota Mutual Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for non-payment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed



December 1943

42351

Samuel J. Bennett,

Appellant,

Respondent.

MINNESOTA MUTUAL LIFE INSURANCE COMPANY, a corporation,

Appellee.

3261A.453

MR. JUSTICE THOMAS delivered the opinion of the court.

Plaintiff, Samuel J. Bennett, as a former policyholder and member of the Minnesota Mutual Life Insurance Company, brought this suit in equity against said insurance company on his behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and were he claiming to represent. The complaint alleged plaintiff's right to the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to him and then all former policyholders of the Minnesota Mutual Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for non-payment of premium or not surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 43 and 45 of the Civil Practice Act (Laws 1933 and 1935, chaps. 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000).

concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States ) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, J.J., concur.



concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 43953. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Levin v. The Mutual Life Insurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit Court dismissing this cause for want of equity is affirmed.

ATTEST.

Friend and Counsel, J. B. Cowan.

42973

ANNA PIETROLONARDO,  
Appellant,

v.

JAY R. HOUGHTELING, HELEN HOUGHTEL-  
ING and PIONEER TRUST AND SAVINGS  
COMPANY, a corporation,  
Appellee.

343 A  
APPEAL FROM  
CIRCUIT COURT,  
COOK COUNTY.

326 I.A. 459<sup>2</sup>

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Jay R. Houghteling and his wife Helen were owners of a two-story building on Fullerton avenue in Chicago which was maintained and managed for them by the Pioneer Trust and Savings Bank. The building consisted of a store with an apartment above, which was occupied under a month-to-month tenancy by plaintiff's family, including her married son. Plaintiff fell and was injured on a stairway leading from the vacant store to the basement of the building. She brought suit against the Houghtelings as owners and the bank as manager of the premises. Plaintiff alleged and adduced evidence of a special agreement with the manager of the premises, that she was an invitee in the use of the stairway, which was carelessly and negligently maintained in a dangerous and unsafe condition. The first trial resulted in a verdict and judgment against all defendants for \$7500, from which they appealed. We were of the opinion (314 Ill. App. 568, abst. opinion) that the verdict was contrary to the manifest weight of the evidence and entered an order reversing the judgment and remanding the cause for retrial. On the second trial substantially the same evidence was adduced on behalf of plaintiff but certain impeaching evidence introduced by defendants upon the first trial, was omitted, thus constituting a stronger case in



ATTA FIRST CHANCERY,  
Court of Chancery,  
County of New York.

v.

JAY R. HOUTGASTLING, HUSBAND-  
ING and FLORENCE TRUST AND SAVINGS  
CORP., a corporation,  
Defendant.

APPEAL FROM  
CIRCUIT COURT,  
COUNTY OF NEW YORK.

3261A-453

THE JUSTICE OF THE PEACE FOR THE COUNTY OF NEW YORK.

Jay R. Houtgastling and his wife Helen were owners of  
a two-story building on Fulton Avenue in Chicago which was  
maintained and managed for them by the Florence Trust and Savings  
Bank. The building consisted of a store with an apartment above,  
which was occupied under a month-to-month tenancy by Plaintiff's  
family, including her married son. Plaintiff fell and was injured  
on a stairway leading from the vacant store to the basement of  
the building. The product suit against the Houtgastlings as  
owners and the bank as manager of the premises. Plaintiff alleged  
and adduced evidence of a special agreement with the manager  
of the premises, that she was an invitee in the use of the stair-  
way, which was carelessly and negligently maintained in a danger-  
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of the evidence and entered an order reversing the judgment and  
remanding the cause for retrial. On the second trial and-  
stantially the same evidence was adduced on behalf of Plaintiff  
but certain impeaching evidence introduced by defendants upon the  
first trial, was omitted, thus constituting a stronger case in

2.

her favor than upon the first trial. The second jury awarded her \$14,700. Defendants thereupon filed a motion for judgment on special findings of the jury, a motion for judgment notwithstanding the verdict, and a motion for a new trial. The motion for judgment on the special findings was overruled, the motion for a new trial was denied, but the motion for judgment notwithstanding the verdict was allowed, and judgment was entered thereon in favor of defendants. In rendering judgment notwithstanding the verdict the court filed a memorandum opinion holding in effect that it was <sup>not</sup> a common stairway, that plaintiff was not an invitee but a permittee, and that the latter relationship did not impose any obligation upon the landlord to keep the premises so permissibly used, in repair for the permitted purpose.

After a careful review of the record we think the court erred in concluding that plaintiff was precluded from recovery as a matter of law. Plaintiff adduced evidence of her right to use the inner stairway in lieu of the unusable rear stairway as a part of the original leasing, and without which no lease would have been made. Whether she had the right by express permission to enter upon the stairway, and was therefore an invitee, or whether she was accomplishing a task of her own or one for the mutual benefit of herself and the defendants, were questions of fact for the jury; and although the evidence seemed insufficient upon the first trial to support a verdict, it was not intended in reversing the judgment and remanding the case for retrial, that the rights of the parties should be terminated as a matter of law without giving effect to the findings of the jury. The Supreme court recently expressed its view on the functions of the jury as a fact-finding body in the case of People v. Hanisch, 361 Ill. 466, as follows: "Whatever may be the rule in certain other juris-



her favor than upon the first trial. The second jury awarded her \$14,700. Defendant thereupon filed a motion for judgment on special findings of the jury, a motion for judgment notwithstanding the verdict, and a motion for a new trial. The motion for judgment on the special findings was overruled, the motion for a new trial was denied, but the motion for judgment notwithstanding the verdict was allowed, and judgment was entered thereon in favor of defendant. In rendering judgment notwithstanding the verdict the court filed a memorandum opinion holding in effect that it was <sup>not</sup> a common stairway, that plaintiff was not an invitee but a permittee, and that the latter relationship did not impose any obligation upon the landlord to keep the premises so perilously used, in repair for the permitted purpose.

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3.

dictions, we firmly adhere to our often-asserted belief that it is the province of the jury, alone, to determine the weight of the evidence and the credibility of witnesses. If it were not so there would be little use for the jury system. The jury, as a fact-finding body, is of such importance that an abridgment of its functions in this regard and an appropriation of them by the judges would mean the forsaking of a valued tradition in our system of jurisprudence. The utmost caution should be exercised not only by the trial courts but by the reviewing courts to uphold the sanctity of the trial by jury."

Two juries have now resolved the issues in favor of plaintiff, the second jury almost doubling the verdict of the first, probably as <sup>the</sup> result of the testimony of Alphonse Pietrolonardo, plaintiff's husband, who injected into the record, although it may have been inadvertently done, a reference to insurance. If the present judgment were to be reversed and the cause again remanded for a new trial, it is fair to assume that substantially the same evidence would be presented to a third jury, and in accordance with the established policy of the reviewing courts, "where there have been two or more verdicts in a case for the same party and there is any evidence to sustain the judgment appealed from, appellate courts are very reluctant to disturb it." Norkevich v. Atchison T & S. F. Ry. Co., 263 Ill. App. 1.

However, we have concluded that the sum of \$7500 assessed by the first jury, is ~~ample~~ compensation for the injury sustained, which was a fractured arm, and therefore if plaintiff will consent to a remittitur of \$7200 within ten days, the judgment notwithstanding the verdict will be reversed and the cause remanded with directions to enter judgment on the verdict for



directions, we firmly adhere to our oft-stated belief that it is the province of the jury, alone, to determine the weight of the evidence and the credibility of witnesses. It is not for the court to interfere with the jury's verdict. The jury, as a fact-finding body, is of such importance that an abridgment of its functions in this regard and an appropriation of them by the judges would be an invasion of a valued tradition in our system of jurisprudence. The utmost caution should be exercised not only by the trial courts but by the reviewing courts to uphold the sanctity of the trial by jury.

Two juries have now resolved the issues in favor of plaintiff, the second jury almost doubling the verdict of the first, probably as a result of the testimony of the plaintiff's witnesses, who injected into the record, although it may have been inadvertently done, a reference to insurance. If the present judgment were to be reversed and the case remanded for a new trial, it is fair to assume that substantially the same evidence would be presented to a third jury, and in accordance with the established policy of the reviewing courts, "where there have been two or more verdicts in a case for the same party and there is any evidence to sustain the judgment appealed from, appellate courts are very reluctant to disturb it." Korvovich v. Korvovich, 212 Ill. App. 1.

However, we have concluded that the law of 1925, as amended by the first jury, is in conformity with the policy of the reviewing courts, and therefore it is our duty to affirm the judgment of the first jury. The court will consent to a remittitur of \$10,000 within ten days, the judgment notwithstanding the verdict will be reversed and the case remanded with directions to enter judgment on the verdict for

4.

the reduced amount; otherwise the judgment will be reversed and the cause remanded for a new trial.

UPON CONSENT TO A REMITTITUR OF  
\$7200 WITHIN TEN DAYS JUDGMENT  
NOTWITHSTANDING THE VERDICT  
REVERSED AND THE CAUSE REMANDED  
WITH DIRECTIONS TO ENTER JUDGMENT  
FOR THE REDUCED AMOUNT; OTHERWISE,  
JUDGMENT TO BE REVERSED AND CAUSE  
REMANDED FOR A NEW TRIAL.

Sullivan, P. J., and Scanlan, J., concur.



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and the same record for ...

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43393

T. L. MILLER,  
Appellee,

v.

UNION STATE INVESTMENT  
COMPANY, a corporation,  
UNION INVESTMENT COMPANY,  
a trust, JULIUS F. SMETANKA,  
VIRGINIA PREBIS, also known as  
Mrs. Eugene Tabero, also known  
as Mrs. Eugene Taber, EUGENE  
TABERO, also known as Eugene  
Taber, and MAX BUZIK,  
Defendants.

On Appeal of UNION STATE  
INVESTMENT COMPANY, a  
corporation,  
Appellant.

344 A  
APPEAL FROM THE CIRCUIT  
COURT OF COOK COUNTY FROM  
INTERLOCUTORY ORDER  
APPOINTING A RECEIVER.

326 I.A. 460

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order of the Circuit court appointing a receiver for Union State Investment Company, a corporation.

It appears from the complaint that November 2, 1938 Charles H. Albers, as receiver of the Union State Bank of South Chicago, recovered judgment for the sum of \$48,841.69 and costs in the Municipal court against the defendant, Union Real Estate Agency and Loan Corporation, also known as Union State Investment Company; that while said judgment was in full force and effect Albers, for the purpose of securing satisfaction thereof, sued out a writ of execution on November 9, 1938 which was returned "no part satisfied"; that the judgment is still in full force and effect and has not been paid; that prior to the filing of the complaint defendant had ceased doing business and was on December 20, 1944 dissolved at the instance of the attorney general for failure to pay its franchise taxes. By means of this proceeding plaintiff seeks to wind up the affairs of the debtor corporation and to collect the judgment, and the complaint



Oct. 1888

[illegible]

On appeal of UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
CORPORATION

corruption and to collect the judgment, and the complaint seeking plaintiff seeks to wind up the affairs of the latter failure to pay its franchise taxes. By means of this proceeding 1944 dissolved at the instance of the attorney general for defendant had ceased doing business and was on December 20, not been paid; that prior to the filing of the complaint that the judgment is still in full force and effect and has on November 9, 1938 which was returned "no part satisfied"; securing satisfaction thereof, and out a writ of execution was in full force and effect against Albers, for the purpose of as Union State Investment Company; that while said judgment Union Real Estate Agency and is a corporation, also known and costs in the judicial court against the defendant, North Chicago, recovered judgment for the sum of \$45,841.00 Charles E. Albers, as receiver of the Union State Bank of It appears from the complaint that November 2, 1938 defendant company, a corporation.

Without court appointing a receiver for Union State Investment This is an appeal from an interlocutory order of the U.S. District Court at Chicago, Illinois.

prays for the appointment of a receiver to take possession of defendant's assets during the pendency of the suit and for the issuance of an injunction to restrain the debtor and other persons from disposing of any assets belonging to the corporation. On February 7, 1945 plaintiff served notice upon all of the defendants that application would be made to the court for the appointment of a receiver and the issuance of a restraining order. When the motion was presented the court ordered defendants to file a written answer and set the matters for hearing on February 16, 1945. Julius F. Smietanka, one of the defendants, filed an answer wherein he averred that the corporation was dissolved by order of court prior to the filing of the complaint; that prior thereto it had been engaged in the business of managing real estate, lending and transmitting money, selling insurance and securities at 3026 East 92nd street in Chicago; that Albers' judgment in the Municipal court was based upon certain collateral notes held by the receiver which were secured by stocks, bonds and securities having a face value in excess of the money due on the note; that the judgment had been reduced from proceeds of sale of the securities, the exact amount of the reduction being unknown or unascertained; that Virginia Prebis purchased and obtained title to the premises occupied by the debtor corporation in Chicago on February 19, 1942 and had become the owner thereof; that all the parties interested in the Union State Investment Company were solvent and able to respond in damages, and that they would be irreparably damaged if an injunction were to issue or a receiver to be appointed; that neither the Union State Investment Company, Smietanka, Virginia Prebis, or the other defendants had in their possession or control any property effects of beneficial interest to the debtor



control any property effects of beneficial interest to the debtor  
Frieda, or the other defendants had in their possession or  
neither the Union State Investment Company, Baltimore, Virginia  
injunction were to issue or a receiver to be appointed; that  
damages, and that they would be irreparably damaged if an  
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poration in Chicago on February 19, 1942 and had become the  
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being unknown or unascertained; that Virginia Frieda purchased  
of sale of the securities, the exact amount of the reduction  
the note; that the judgment had been reduced from proceeds  
securities having a face value in excess of the money and an  
held by the receiver which were secured by stocks, bonds and  
in the Municipal Court was based upon certain collateral notes  
this at 3026 East 92nd Street in Chicago; that Virginia Frieda  
lending and transmitting money, selling insurance and securi-  
it had been engaged in the business of managing real estate,  
Court prior to the filing of the complaint; that prior thereto  
he averred that the corporation was dissolved by order of  
Gristman, one of the defendants, filed an answer wherein  
the matter for hearing on February 16, 1942, Illinois,  
Court ordered defendants to file a written answer and set  
of a restraining order. When the motion was presented the  
the Court for the appointment of a receiver and the issuance  
upon all of the defendants and application would be made to  
corporation. On February 17, 1942, plaintiff served notice  
other persons from disposing of any assets belonging to the  
the issuance of an injunction to restrain the debtor and  
debtor's assets during the pendency of the suit and for  
prior to the appointment of a receiver to have possession of

corporation; and he therefore prayed that the motion for a receiver and injunction be denied.

Virginia Prebis also filed an answer by Joseph G. Smietanka as her attorney wherein she disclaimed knowledge as to the obligations of the debtor corporation and of its affairs, and averred that she purchased the real estate of the corporation at 3026 East 92nd street, Chicago, obtained a deed thereto, and assumed all unpaid taxes thereon. Neither the corporation nor any of the other defendants filed an answer to plaintiff's motion, and none of them filed an appearance until March 5, 1945, after the motion had been heard and determined.

The motion came on for hearing February 20, 1945, and the court after reading the complaint and answers thereto entered an order appointing a receiver for the debtor corporation, and directed the issuance of an injunction restraining the corporation, its officers and directors from disposing of any assets held by them which belonged to the debtor corporation. The order directed that plaintiff file a bond for \$1,000 before the injunction order issue. However, no injunction was ever issued. The order inadvertently omitted the specification or provision for a complainant's bond for the appointment of a receiver, and also failed to waive the bond.

Subsequently, February 26, 1945, some seven days before written appearance was entered for the debtor corporation, and six days after the entry of the order appointing the receiver and providing for the issuance of the injunction, counsel appeared on behalf of the debtor corporation and requested the court to fix an appeal bond from the order appointing a receiver and issuing an injunction. March 5, 1945 Union State Investment Company filed a bond which was then approved,



corporation; and in the event that the motion for a receiver and in the event of denial.

Virginia Trusts also filed an answer by Joseph A. Williams as her attorney wherein she disclaimed knowledge as to the whereabouts of the debtor corporation and of its affairs, and averred that she purchased the real estate of the corporation at 3025 East Third Street, Chicago, obtained a deed thereto, and assigned all rights therein. Neither the corporation nor any of the other defendants filed an answer to plaintiff's motion, and none of them filed an appearance until March 5, 1945, after the motion had been heard and determined.

The motion came on for hearing February 20, 1945, and the court after reading the complaint and answers thereto entered an order appointing a receiver for the debtor corporation, and directed the issuance of an injunction restraining the corporation, its officers and directors from disposing of any assets held by them which belonged to the debtor corporation. The order directed that plaintiff file a bond for \$1,000 before the injunction order issued. However, no injunction was ever issued. The order inadvertently omitted the specification or provision for a complainant's bond for the appointment of a receiver, and also failed to waive the bond.

Subsequently, February 20, 1945, some seven days before written appearance was entered for the debtor corporation, and six days after the entry of the order appointing the receiver and providing for the issuance of the injunction, counsel appeared on behalf of the debtor corporation and requested the court to fix an appeal bond from the order appointing a receiver and issuing an injunction. March 5, 1945, when State Investment Company filed a bond which was then approved,

and the following day plaintiff's counsel served notice to all attorneys of record informing them that plaintiff would appear March 8, 1945 and request the court to modify the order entered February 20 so as to withdraw the motion for the issuance of the injunction to make provision for the filing of complainant's bond and to tender that bond and have it approved instanter. When the motion came on for hearing March 8, 1945, plaintiff's counsel and the attorney for the debtor corporation both being present, the court was evidently under the impression that the order of February 20 appointing a receiver provided for the filing of a bond by complainant, but plaintiff's counsel argued that there was no such provision and therefore upon instructions of the court, the files were procured from the clerk's office and disclosed that the order made no provision that plaintiff file a bond, or that the bond be waived. During the discussion counsel for the debtor corporation left the court room, and plaintiff's attorney was instructed to return March 9, the following day. On that day Joseph G. Smietanka, who was associated with Charles D. Snewind, attorney for the corporation, appeared in court, as did also plaintiff's counsel. Mr. Smietanka objected to the modification of the order entered February 20; whereupon the court stated that it was his intention originally to provide for complainant's bond for the appointment of a receiver, but that such provision was inadvertently omitted from the written order. After argument by counsel on both sides, the court allowed the motion to withdraw the original request for the issuance of the injunction and also amended the order of February 20 nunc pro tunc so as to provide for a complainant's bond. Plaintiff then and there instanter filed the required complainant's bond for the appointment of a receiver,



and the following day plaintiff's counsel moved to set aside all attorneys of record indicating that plaintiff would appear March 8, 1945 and request the court to modify the order entered February 23 so as to withdraw the motion for the issuance of the injunction to make provision for the filing of complainant's bond and to tender that bond and have it approved instantly. When the motion came on for hearing March 8, 1945, plaintiff's counsel and the attorney for the debtor corporation both being present, the court was evidently under the impression that the order of February 23 appointing a receiver provided for the filing of a bond by complainant, but plaintiff's counsel argued that there was no such provision and therefore upon instructions of the court, the files were produced from the clerk's office and disclosed that the order made no provision that plaintiff file a bond, or that the bond be waived. During the discussion counsel for the debtor corporation left the court room, and plaintiff's attorney was instructed to return March 9, the following day. On that day Joseph C. Chastain, who was associated with Charles B. Newmyer, attorney for the corporation, appeared in court, as did also plaintiff's counsel, J. Chastain. Objected to the modification of the order entered February 23; whereupon the court stated that it was his intention originally to provide for complainant's bond for the appointment of a receiver, but that such provision was inadvertently omitted from the written order. After argument by counsel on both sides, the court allowed the motion to withdraw the original request for the issuance of the injunction and also amended the order of February 23 to provide so as to provide for a complainant's bond. Plaintiff then and there instantly filed the required complainant's bond for the appointment of a receiver,

and the same was approved by the court.

The two questions presented for consideration are: (1) whether the order of February 20, 1945 appointing a receiver was effectively and properly amended nunc pro tunc on March 9, 1945, and (2) whether this was a proper case for the appointment of a receiver pendente lite.

We think the case of Central Trust Co. v. McGurn, 257 Ill. App. 45, is determinative of the first question. The opinion, concurred in by all the justices of the three divisions of the Appellate court, held that if the case is a proper one for the appointment of a receiver, such appointment will be upheld although the order appointing the receiver may be erroneous in some respects. In that proceeding defendant was notified that an application would be made for the appointment of a receiver. The motion was heard on the verified bill of complaint. The original order there entered on December 19, 1929 failed to provide for a complainant's bond, nor did it waive the filing thereof. Like the case at bar, the order there was amended during term time, December 31, 1929, and for good cause shown the court excused the giving of the bond. It was there contended, as it is in this proceeding, that the court was without power to appoint a receiver without first requiring complainant to give a bond, unless the giving of such bond was dispensed with in the order of appointment, as required by paragraph 55, chapter 22, Cahill's 1929 Statutes, and that since the order appointing a receiver failed to provide that no bond need be given by the complainant, the order was erroneous and should be reversed. The court pointed out that an order appointing a receiver must comply with the provisions of the statute,



and the same was approved by the court.  
The two questions presented for consideration are:

(1) Whether the order of February 20, 1942, appointing a receiver was effective and properly issued under the provisions of the Statute, and (2) whether this was a proper case for the appointment of a receiver under the Statute.

We take the case of *Central Trust Co. v. Johnson*, 277 Ill. App. 2d, 114 S.W.2d 100, 101, as authority for the proposition that the order, entered in 1942, in violation of the terms of the order, was not valid. It is held that the case is a proper one for the appointment of a receiver, and the court will be bound to appoint a receiver in such cases.

The defendant was notified that an application would be made for the appointment of a receiver. The motion was heard on the verified bill of complaint. The original order there entered on December 1, 1942, failed to provide for a complete and final hearing, nor did it state the finding of fact.

The case at bar, the order there was amended during term time, December 11, 1942, and for good cause shown the court entered the finding of fact. It was there concluded, as it is in this proceeding, that the court was without power to appoint a receiver without first requiring complainant to give a bond, unless the finding of fact was dispensed with in the order of appointment, as required by paragraph 2, and the 13th.

Section 13 of the Statute, and that since the order appointing a receiver failed to provide that no bond need be given by the complainant, the order was erroneous and should be reversed. The court pointed out that in order appointing a receiver must comply with the provisions of the statute.

but on the authority of several cases cited in the decision, held that "it would have been an idle and useless ceremony to reverse the order because it was not in accordance with the statute where no purpose would be served by doing so. The law never requires the doing of a useless act." In Redington v. Craig, 270 Ill. App. 163, the court held it proper to amend a decree appointing a receiver nunc pro tunc even after term time, and in Walker v. Kersten, 115 Ill. App. 130, the court refused to vacate an order appointing a receiver even though the complainant did not give bond as required by statute, because "the case was a proper one for the appointment of a receiver" and "the error [failure to provide for complainant's bond] was not harmful." In Chicago Title and Trust Co. v. Johnson, 268 Ill. App. 184, a like result was attained upon the authority of the McGurn case. In our opinion the case at bar is even stronger than the McGurn case because the filing of a bond was not excused but was actually required and the bond filed, thus giving defendant the security contemplated by the statute.

As to the remaining question, namely, whether this was a proper case for the appointment of a receiver, we find from the allegations of the complaint that plaintiff is a judgment creditor; that an execution issued "no part satisfied"; that the corporation had recently been dissolved; and that certain assets were fraudulently conveyed. These essential facts being alleged and admitted, both the statute and the authorities in this state justified the appointment of a receiver. Section 86 of chapter 32, Ill. Rev. Stat. 1943, vests courts of equity with full power to liquidate the assets and business of a corporation "upon the suit of a creditor whose claim has either been reduced to judgment



but on the authority of several cases cited in the decision, held that "it would have been an idle and useless ceremony to reverse the order because it was not in accordance with the statute where no purpose would be served by doing so. The law never requires the doing of a useless act." In Reorganization of the City of New York, Inc., 1943, 131 F.2d 841, the court held it proper to amend a decree appointing a receiver where the two even after term time, and in Reorganization of the City of New York, Inc., 131 F.2d 841, the court refused to vacate an order appointing a receiver even though the complaint did not give bond as required by statute, because the case was a proper one for the appointment of a receiver, and the error [failure to provide for complainant's bond] was not material. In Reorganization of the City of New York, Inc., 131 F.2d 841, the court held that the result was attained upon the authority of the Reorganization of the City of New York, Inc. case. In our opinion the case at bar is even stronger than the Reorganization of the City of New York, Inc. case because the filing of a bond was not required but was actually required and the bond filed, thus giving defendant the security contemplated by the statute.

As to the remaining question, namely, whether this was a proper case for the appointment of a receiver, we find from the allegations of the complaint that plaintiff is a judgment creditor; that an execution issued "no part satisfied"; that the corporation had recently been dissolved; and that certain assets were fraudulently conveyed. These essential facts being alleged and admitted, both the statute and the authorities in this state justify the appointment of a receiver. Section 66 of chapter 32, Ill. Rev. Stat. 1943, vests courts of equity with full power to liquidate the assets and business of a corporation "upon the sale of a creditor whose claim has either been refused to judgment

and an execution thereon returned unsatisfied, or whose claim is admitted by the corporation, when in either case it is made to appear that the corporation is unable to pay its debts and obligations in the regular course of business as they mature"; and section 87 of the same statute provides that "in proceedings to liquidate the assets and business of a corporation the court shall have all the ordinary powers of a court of equity to issue injunctions, to appoint a receiver or receivers pendente lite with such powers and duties as the court, from time to time, may direct, and to take such other proceedings as may be requisite to preserve the corporate assets and carry on the business of the corporation until a full hearing can be had." In Lindgren-Mahan Co. v. Revere Rubber Co., 70 Ill. App. 379, the court appointed a receiver for an insolvent corporation. The complaint contained no prayer that the receiver should take possession of any specific property. As in the case at bar, the debtor corporation alone appealed the receiver's appointment and the interlocutory order was affirmed. The court said that "it was simply the case of the appointment of a receiver of an insolvent corporation which had ceased to do business leaving debts unpaid, and had nothing left to it in the way of tangible assets subject to execution." Peterson Co. v. Asphalt Sales Corp., 235 Ill. App. 592, sustains the contention that a receiver pendente lite may be appointed upon a creditor's suit against a corporation where a judgment execution has been issued, demand made, the execution returned "no part satisfied," and the judgment still in force and effect, the corporation having ceased doing business and being hopelessly insolvent.

For the reasons indicated we think the order appointing a receiver should be affirmed, and it is so ordered.

ORDER AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.



and an execution thereon returned unsatisfied, or whose claim is admitted by the corporation, when in either case it is held to appear that the corporation is unable to pay its debts and obligations in the regular course of business as they mature; and section 17 of the same statute provides that the proceedings to liquidate the assets and business of a corporation the court shall have all the ordinary powers of a court of equity to issue injunctions, to appoint a receiver or receivers pendente lite with such powers and duties as the court, from time to time, may direct, and to take such other proceedings as may be requisite to preserve the corporate assets and carry on the business of the corporation until a final hearing can be had. In Windsor Iron Co. v. Windsor Iron Co., 70 Ill. App. 375, the court appointed a receiver for an insolvent corporation. The complaint contained no prayer that the receiver should have possession of any specific property. As in the case at bar, the corporation alone appealed the receiver's appointment and the interlocutory order was affirmed. The court said that "it was simply the case of the appointment of a receiver of an insolvent corporation which had ceased to do business leaving debts unpaid, and had nothing left to it in the way of tangible assets subject to execution." Windsor Iron Co. v. Windsor Iron Co., 70 Ill. App. 375, contains the proposition that a receiver pendente lite may be appointed upon a creditor's suit against a corporation where a judgment execution has been issued, demand made, the execution returned "no part satisfied," and the judgment still in force and effect, the corporation having ceased doing business and being hopelessly insolvent. For the reasons instated we think the order appointing a receiver should be affirmed, and it is so ordered.

ORDER AFFIRMED.

Sullivan, P. J., and Keenan, J., concur.

43297

PAUL LENCHARD,  
Appellee,

v.

THOMAS J. FRIEL and CHARLES  
C. RENSHAW, as Trustees, etc.,  
et al., doing business as  
CHICAGO SURFACE LINES, and  
M. J. O'BRIEN,  
Appellants.

345 A  
APPEAL FROM SUPERIOR  
COURT OF COOK COUNTY.

326 I.A. 461

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover damages for personal injuries sustained by him when, as he alleges, a northbound Halsted street car drove into the rear of his automobile as it was standing on the track at 55th street (also known as Garfield boulevard). A jury returned a verdict finding defendants guilty and assessing plaintiff's damages at \$3,000. Defendants appeal from a judgment entered upon the verdict.

Defendants do not contend that the amount of damages awarded by the jury is excessive. Their first contention is that the verdict is against the manifest weight of the evidence and that the trial court erred in refusing them a new trial. The accident occurred on May 10, 1941, about 3 p. m., at the intersection of the westbound drive on Garfield boulevard with Halsted street. Halsted street runs north and south and is about fifty feet wide. Garfield boulevard runs east and west and has two drives, one for westbound traffic and another for eastbound traffic. The drives are separated by a parkway seventy-five feet wide; each drive is about forty or forty-five feet wide. Just prior to the accident plaintiff was driving north on Halsted street and intended to proceed north on that street until he reached Chicago avenue, which is a number of miles from the place of the accident. Plaintiff's





theory of fact was that as he reached the eastbound drive of Carfield boulevard he had the green light but that as he reached the westbound drive the amber light showed and he slowed down; that at the same time a westbound automobile on 55th street turned north on Halsted; that he brought his car to a smooth stop; that about six or seven seconds thereafter, and while his automobile was "standing still," a northbound Halsted street car struck the rear of his automobile. Defendants' theory of fact was that as the northbound Halsted street car was crossing 55th street and was approaching the south side of the westbound drive plaintiff's automobile passed the street car on its east side and cut in or swerved to the left in front of the street car and that the automobile swerved so close to the street car that it was impossible for the motorman to stop the street car before it collided with the automobile. There was evidence that supported each theory of fact. The case was bitterly contested and each side sought to impeach certain witnesses called by the other side. After a careful examination of the entire evidence we are satisfied that we would not be justified in sustaining the instant contention of defendants. The jury saw and heard the witnesses and had a much better opportunity than we have to determine the credibility of the witnesses and the weight, if any, that should be attached to their testimony. This case, in our judgment, was peculiarly one for a jury to decide. The trial judge approved the verdict of the jury. As was said in People v. Hanisch, 361 Ill. 465, 468: "Whatever may be the rule in certain other jurisdictions, we firmly adhere to our often-asserted belief that it is the province of the jury, alone, to determine the weight of the evidence and the credibility of witnesses. If it were not so there would be little use



theory of fact was that as he reached the westbound drive of  
Carroll's driveway he had the green light and that as he  
reached the westbound drive the light turned red and he  
stopped; that at the same time a westbound automobile  
on Fifth Street turned north on W. Street; that he brought his  
car to a sudden stop; that about six or seven seconds there-  
after, and while his automobile was "standing still," a  
northbound vehicle struck the front of his auto-  
mobile. Defendant's theory of fact was that as the northbound  
vehicle struck his car was moving Fifth Street and was approaching  
the south side of the westbound drive defendant's auto mobile  
passed the street car on its left side and cut in or swerved  
to the left in front of the street car and that the automobile  
swerved so close to the street car that it was impossible for  
the defendant to stop the street car before it collided with the  
automobile. There was evidence that each of the two  
fact. The case was bitterly contested and each side sought to  
impeach certain witnesses called by the other side. After a  
careful examination of the entire evidence we are satisfied  
that we could not be justified in sustaining the instant con-  
tention of defendants. The jury saw and heard the witnesses  
and had a much better opportunity than we have to determine the  
credibility of the witnesses and the weight, if any, that  
should be attached to their testimony. This case, in our judg-  
ment, was peculiarly one for a jury to decide. The trial judge  
approved the verdict of the jury. As was said in People v.  
Huntley, 301 Ill. 405, 408: "Whenever may be the rule in  
certain other jurisdictions, we firmly adhere to our often-  
asserted belief that it is the province of the jury, alone,  
to determine the weight of the evidence and the credibility  
of witnesses. If it were not so there would be little use

for the jury system. The jury, as a fact-finding body, is of such importance that an abridgment of its functions in this regard and an appropriation of them by the judges would mean the forsaking of a valued tradition in our system of jurisprudence. The utmost caution should be exercised not only by the trial courts but by the reviewing courts to uphold the sanctity of the trial by jury."

Defendants contend that the trial court erred in refusing to give defendants' instruction No. 24. The subject matter of this instruction was, in substance, fairly covered by defendants' given instruction No. 7. The strained argument of defendants that there is a material difference between the two instructions is not persuasive. We find no merit in defendants' contention that the trial court erred in refusing their instruction No. 25, as the subject matter of the instruction was covered by defendants' instructions Nos. 5 and 11.

Defendants contend that the court erred in refusing their instruction No. 34. That instruction reads as follows: "The happening of an accident does not raise a presumption of negligence on behalf of the defendants, but the burden is on the plaintiff to show by a preponderance or greater weight of the evidence, under the instructions of the court, that the accident in question was the proximate result of the negligence charged, and that the plaintiff was at and before the time and place in question in the exercise of ordinary care for his own safety." (Italics ours.) Defendants contend that the law stated in that part of the instruction that we have italicized is a correct rule of law; that it was not given in any other instruction, and defendants were prejudiced by the failure of the court to give it. Defendants concede that the italicized part of the instruction has been condemned



for the jury system. The jury, as a fact-finding body, is of such importance that an affirmation of its findings in this regard and an appreciation of the fact that the judges would have the benefit of a valid tradition in our system of jurisprudence. The strictest caution should be exercised not only by the trial courts but by the reviewing courts to uphold the sanctity of the trial by jury."

Defendants contend that the trial court erred in refusing to give defendants' instruction No. 24. The subject matter of this instruction was, in substance, fairly covered by defendants' given instruction No. 7. The attached argument of defendants that there is a material difference between the two instructions is not persuasive. We find no merit in defendants' contention that the trial court erred in refusing their instruction No. 24, as the subject matter of the instruction was covered by defendants' instruction No. 7 and

II.

Defendants contend that the court erred in refusing their instruction No. 24. That instruction reads as follows: "The proposition of an expert is not a presumption of negligence on behalf of the defendant, but the burden is on the plaintiff to show by a preponderance of greater weight of the evidence, under the instructions of the court, that the accident in question was the proximate result of the negligence charged, and that the plaintiff was at fault before the time and place in question in the exercise of ordinary care for his own safety." (Emphasis ours.) Defendants contend that the law stated in that part of the instruction that we have italicized is a correct rule of law; that it was not given in any other instruction; and that it was prejudicial by the failure of the court to give it. Defendants concede that the italicized part of the instruction has been condemned

in a number of cases, but they contend that the Supreme court definitely held in Huff v. I. C. R. R. Co., 362 Ill. 95, 101, that "The mere happening of the accident raises no presumption that it was caused by negligence," and defendants argue that under that ruling the refusal of the instruction was reversible error. In Kovacs v. Richardson, 306 Ill. App. 194, 198, we said:

"As to proposition 3: Defendants contend that the court erred in refusing to give the following instruction requested by them: '21. If you believe from the evidence that the injury to the plaintiff, if she was injured, was the result of a mere accident which occurred without negligence on the part of the defendants as charged in the complaint, or in some count thereof, then the defendants are not liable in this case.' Under the facts of the instant case this instruction could only confuse and mislead the jury. That was its plain purpose. In the case of Streeter v. Humrichouse, 357 Ill. 234, Mr. Justice Farthing hit the nail on the head when he held that an instruction like the one in question should not be given in a case unless there was evidence that a plaintiff was injured through accident, alone. In the instant case, if the accident to plaintiff occurred through the negligence of defendants, or through the negligence of plaintiff, or through the negligence of plaintiff and defendants, the injuries to plaintiff would not be caused by 'a mere accident.'"

In the instant case defendants made no claim that the injuries to plaintiff were caused by "a mere accident," nor was there any evidence in the case upon which such a claim could be based. Indeed, defendants, in their brief, argue that the sole cause of the accident was the negligent conduct of plaintiff. As we stated in the Kovacs case, "Under the



in a number of cases, but they contend that the Supreme Court definitely held in *Ill. v. ...* that "the mere happening of the accident raises no presumption that it was caused by negligence," and defendants argue that under that ruling the reversal of the instruction was reversible error. In *Lovace v. ...*, 100 Ill. App. 1st 14, 198, 200.

"As to proposition 3, defendants contend that the court erred in refusing to give the following instruction requested by them: '11. If you believe from the evidence that the injury to the plaintiff, if it was injury, was the result of a mere accident which occurred without negligence on the part of the defendants as charged in the complaint, or in some count thereof, then the defendants are not liable in this case.' Under the facts of the instant case this instruction could only confuse and mislead the jury. That was its plain purpose. In the case of *Grester v. ...*, 337 Ill. 234, the Justice pointing out the fallacy of the instruction held that an instruction like the one in question should not be given in a case where there was evidence that a plaintiff was injured through accident, alone. In the instant case, if the accident to plaintiff occurred through the negligence of defendants, or through the negligence of plaintiff, or through the negligence of plaintiff and defendants, the injuries to plaintiff would not be caused by 'a mere accident'."

In the instant case defendants made no claim that the injuries to plaintiff were caused by "a mere accident," nor was there any evidence in the case upon which such a claim could be based. Indeed, defendants, in their brief, argue that the sole cause of the accident was the negligent conduct of plaintiff. As we stated in the *Lovace* case, "under the

facts of the instant case this instruction could only confuse and mislead the jury. That was its plain purpose." In the Huff case, upon which defendants rely, there was no evidence introduced by the plaintiff to prove the cause of the accident, and the court held that under such a state of the record the mere happening of the accident raised no presumption that it was caused by negligence.

Defendants contend that the trial court erred in refusing their instruction No. 36. That instruction reads as follows: "The fact that the court has given any instructions on the subject of plaintiff's damages or injuries, or that defendants' counsel has discussed such subject is not to be taken by you as any intimation by the court or as any admission by the defendants of the defendants' liability for the injury complained of." (Italics ours.) Defendants concede that the unitalicized part of the instruction was included in a special instruction drafted by the trial court, but they contend that that instruction failed to include the italicized part of instruction No. 36 and that such failure constituted reversible error. The able counsel for defendants are unable to cite any case that supports their contention.

Defendants contend that the trial court erred in refusing to give their instruction No. 27. As to this contention it is sufficient to say that the instruction relates solely to the question of damages, and as defendants make no point in their brief that the damages awarded were excessive, we fail to see how the refusal to give instruction No. 27 could have harmed them.

The last contention raised by defendants is that the trial court committed error in permitting three reports to be taken to the jury room. A report made by Officer O'Brien, a witness for defendants, was admitted in evidence as



facts of the instant case this instruction was correct and related the jury. That was its plain purpose. In the self case, upon which defendant relies, there was no evidence introduced by the plaintiff to prove the cause of the accident, and the court held that under such a state of the record the mere happening of the accident raised no presumption that it was caused by negligence.

Defendants contend that the trial court erred in refusing their instruction No. 36. That instruction reads as follows: "The fact that the court has given any instructions on the subject of plaintiff's damages or injuries, or that defendant's counsel has suggested that plaintiff is not to be taken by you as any instruction by the court or as any admission by the defendant of the defendant's liability for the injury complained of." (Italics ours.) Defendants concede that the unadvised part of the instruction was included in a special instruction given by the trial court, but they contend that that instruction failed to include the italicized part of instruction No. 36 and that such failure constituted reversible error. The sole counsel for defendants was unable to cite any case that supports their contention.

Defendants contend that the trial court erred in refusing to give their instruction No. 37. As to this contention it is sufficient to say that the instruction relates solely to the question of damages, and as defendants made no point in their brief that the language suggested was reversible, we fail to see how the refusal to give instruction No. 37 could have harmed them.

The last contention raised by defendants is that the trial court committed error in permitting their reports to be taken to the jury room. A report made by Officer Walker, a witness for defendants, was admitted in evidence as

the last contention raised by defendants is that the trial court committed error in permitting their reports to be taken to the jury room. A report made by Officer Walker, a witness for defendants, was admitted in evidence as

defendants' exhibit 1; a report made by Officer Keating, a witness for plaintiff, was admitted in evidence as plaintiff's exhibit 2; and a report made by plaintiff to his insurance company was admitted in evidence, by agreement, as exhibit A. Defendants contend that these reports were admissible only for the purpose of impeachment and that it was error to permit them to be taken to the jury room. After a careful examination of that part of the record that bears upon this contention it seems clear to us that counsel for defendants and counsel for plaintiffs agreed that the exhibits should go to the jury. Indeed, it appears that at the time they were offered counsel for defendants was anxious to have them go to the jury. After the closing arguments had been made to the jury, but before the jury retired, counsel for defendants then sought to avoid the agreement and objected to the exhibits' going to the jury. The trial court held that there had been an agreement between counsel that the exhibits should go to the jury, and that the parties were bound by the agreement. The trial court, in our judgment, was justified in so holding.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.



defendants' exhibit 1; a report made by Officer Leasing, a witness for plaintiff, was admitted in evidence as plaintiff's exhibit 2; and a report made by plaintiff to his insurance company was admitted in evidence, by agreement, as exhibit 1. Defendants contend that these reports were admissible only for the purpose of impeachment and that it was error to permit them to be taken to the jury room. After a careful examination of that part of the record that bears upon this contention it seems clear to us that counsel for defendants and counsel for plaintiffs agreed that the exhibits should go to the jury. Indeed, it appears that at the time they were offered counsel for defendants was anxious to have them go to the jury. After the closing arguments had been made to the jury, but before the jury retired, counsel for defendants then sought to avoid the agreement and objected to the exhibits' going to the jury. The trial court held that there had been an agreement between counsel that the exhibits should go to the jury, and that the parties were bound by the agreement. The trial court, in our judgment, was justified in so holding.

The judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

Abstract

43297

PAUL LENCHARD,  
Appellee,

v.

THOMAS J. FRIEL and  
CHARLES C. RENSHAW, as  
Trustees, etc., et al.,  
doing business as  
CHICAGO SURFACE LINES,  
and M. J. O'BRIEN,  
Appellants.

APPEAL FROM SUPERIOR  
COURT OF COOK COUNTY.

345  
3201A 461<sup>2</sup>

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

ADDITIONAL OPINION UPON PETITION FOR REHEARING.

In their petition for rehearing defendants state that as it was a bitterly contested case "it is vitally important that the giving and refusal of instructions be free from error and if any error appears therein, the judgment should be reversed," and they ask us to reconsider two points urged by them in their brief: (1) the refusal of the court to give defendants' instruction No. 34, and (2) the refusal of the court to give defendants' instruction No. 27. As to refused instruction No. 34, defendants now argue: "The court misconstrued the meaning and purpose of this instruction. This instruction deals solely with presumption and burden of proof. This instruction does not concern 'mere accident without negligence' nor is it a 'mere fact' instruction"; that "The words 'the accident' in the instant instruction means 'the occurrence', regardless of whether it may have been or may not have been, in fact, caused by negligence. It has no reference to 'a mere accident' which occurred without negligence nor does the instruction undertake to state whether the defendants are or are not liable because of it. It deals solely with presumption and burden of proof." It is sufficient



Abstract

43227

THAT DEFENDANT

is liable

v.

THOMAS A. SMITH and

CHARLES C. SMITH, as

partners, etc., et al.,

doing business as

CHICAGO CIGARETTE MANUFACTURING

AND C. C. SMITH,

Defendants.

CITIZEN SAVING SOCIETY

COUNTY OF COOK, ILLINOIS.

1. JURIST THOMAS SMITHED THE OPINION OF THE COURT.

APPROPRIATE OPINION IS ON PETITION FOR REVERSAL.

In their petition for reversing defendants state

that as it was a blatantly contested case "it is vitally

important that the giving and refusal of instructions be

free from error and if any error appears therein, the

judgment should be reversed," and they ask as to reconsider

two points raised by them in their brief: (1) the refusal

of the court to give defendants' instruction No. 34, and

(2) the refusal of the court to give defendants' instruction

No. 37. As to refused instruction No. 34, defendants say

argue: "The court misinterpreted the meaning and purpose of

this instruction. This instruction deals solely with

presumption and burden of proof. This instruction does

not concern 'mere accident without negligence' nor is it

a 'mere fact' instruction; that 'The words 'mere accident'

in the instant instruction mean 'the occurrence', and

less of whether it may have been or may not have been, in

fact, caused by negligence. It has no reference to 'a

mere accident' which occurred without negligence nor does

the instruction undertake to state whether the defendants

are or are not liable because of it. It deals solely

with presumption and burden of proof." It is sufficient

to say in answer to this argument that if the instruction was intended to deal solely with presumption and burden of proof that subject matter was fully covered in defendants' instructions Nos. 11 and 14, that were given to the jury. Instruction No. 11 reads as follows: "11. The plaintiff cannot recover at all in this case against the defendants unless you believe that the plaintiff has proved by a preponderance of the evidence each of the following propositions: 1. That the plaintiff sustained the injury to his person as charged; 2. That the alleged injury of which plaintiff now complains was not brought about or contributed to by any failure on his part to exercise ordinary care for his own safety at and just before the time of the accident in question; 3. That the defendants were guilty of negligence in the manner charged; 4. That such negligence of the defendants was the proximate or direct cause of plaintiff's alleged injury in question; And if you find from the evidence that the plaintiff has failed to prove by a preponderance of the evidence these propositions as stated, or that he has failed to so prove any of them, he cannot recover against the defendants, and you should find the defendants not guilty." Instruction No. 14 reads as follows: "14. The plaintiff is required by law to prove his case by a preponderance of the evidence before he can recover. If the plaintiff in this case has not so proved his case, or if the evidence is evenly balanced and you are unable to say on which side is the preponderance, then, in either of these cases, the verdict should be not guilty." As to the argument that the words "the accident" in the instruction



to say in answer to this argument that it is the instruction  
was intended to deal solely with presumption and burden of  
proof that subject matter was fully covered in instructions;  
instructions Nos. 11 and 12, that were given to the jury.  
Instruction No. 11 reads as follows: "11. The plaintiff  
cannot recover in this case against the defendants  
unless you believe that the plaintiff has proved by a  
preponderance of the evidence each of the following  
propositions: 1. That the plaintiff sustained the  
injury to his person as charged; 2. That the alleged  
injury of which plaintiff now complains was not brought  
about or contributed to by any failure on his part to  
exercise ordinary care for his own safety at and just  
before the time of the accident in question; 3. That  
the defendants were guilty of negligence in the manner  
charged; 4. That such negligence of the defendants was  
the proximate or direct cause of plaintiff's alleged injury  
in question; and if you find from the evidence that the  
plaintiff has failed to prove by a preponderance of the  
evidence these propositions as stated, or that he has  
failed to so prove any of them, he cannot recover against  
the defendants, and you should find the defendants not  
guilty." Instruction No. 12 reads as follows: "12. The  
plaintiff is required by law to prove his case by a  
preponderance of the evidence before he can recover. If  
the plaintiff in this case has not so proved his case,  
or if the evidence is evenly balanced and you are unable  
to say on which side is the preponderance, then, in either  
of these cases, the verdict should be not guilty." As to  
the argument that the words "the accident" in the instruction

should be interpreted to mean "the occurrence," we may say that as the use of the words "the mere accident" and "the accident" have been so often criticised in cases where the collision did not occur on account of an accident but was due to the negligence of one or more of the parties, it seems strange that the able counsel for defendants did not use the words "the occurrence" in the instruction. (See the late case of Krawitz v. Levinstein, 320 Ill. App. 618, 624.)

As to defendants' refused instruction No. 27: While defendants apparently concede that they did not contend in their brief that the damages awarded by the jury were excessive, in order that there may be no doubt in the matter we quote from their brief:

"PROPOSITIONS RELIED UPON FOR REVERSAL.

"1. The verdict is against the manifest weight of the evidence.

"2. The court erred in refusing to grant a new trial.

"3. There was error in refusal of instructions.

"4. There was error in permitting reports used for impeachment to be taken to the jury room."

But defendants argue that even if they did not question the amount of the damages awarded by the jury, nevertheless, that fact did not constitute a waiver of errors in instructions on damages. As we stated in our opinion, as defendants made no point that the damages awarded were excessive we fail to see how the refusal to give instruction No. 27 could have harmed them.

The petition for rehearing is denied.

PETITION FOR REHEARING DENIED.

Friend, P. J., and Sullivan, J., concur.



should be interpreted as being "the occurrence," we may say that as the use of the words "the occurrence" and "the accident" have been so often criticized in cases where the collision did not occur on account of an accident but was due to the negligence of one or more of the parties, it seems strange that the able counsel for defendants did not use the words "the occurrence" in the instruction. (See the case of *Wright v. Livingston*, 220 Ill. App. 618, 624.)

As to defendant's alleged instruction No. 27: While defendants apparently thought that they did not contend in their brief that the charges asserted by the jury were excessive, in order that there may be no doubt in the matter we quote from their brief:

"DEFENDANTS' BRIEF FOR REVERSAL."

"1. The verdict is against the weight of

the evidence.

"2. The court erred in refusing to grant a new

trial.

"3. There was error in refusal of instructions.

"4. There was error in permitting reports read

for impeachment to be taken to the jury room."

The defendants argue that even if they did not question

the soundness of the charges asserted by the jury, nevertheless,

that fact did not constitute a waiver of error in instructions

on damages. As we stated in our opinion, as defendants

made no point that the charges asserted were excessive or

asked to see how the refusal to give instruction No. 27

could have harmed them.

The petition for rehearing is denied.

ATTORNEY FOR DEFENDANTS: F. J. ...

Friend, J. J., and Sullivan, J., concur.

43365

THOMAS J. SCANLAN and  
RUBY SCANLAN,

Appellants,

v.

RUBIN GARRICK and DAVID  
GARRICK,

Appellees.

346  
APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

3261A.461<sup>3</sup>

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Thomas J. Scanlan and Ruby Scanlan, plaintiffs, brought a forcible entry and detainer suit against Rubin Garrick and David Garrick, defendants, to obtain possession of "Apartment No. 3 on the third floor of the building located at 206 South Hamlin Avenue." The case was tried by the court and at the conclusion of the evidence for plaintiffs there was a finding in favor of defendants. Plaintiffs appeal from a judgment entered upon the finding.

Plaintiffs state in their brief: "Why the court dismissed the suit and denied plaintiffs a judgment for possession is wholly beyond our conception and understanding." Defendants have not filed a brief in this court, but as it appeared from the abstract that Dr. Samuel Garrick was the lessee of the apartment and that he is in the armed forces of the Army of the United States, attached to the medical corps, we read the entire transcript of the record in this cause and as a result we found no difficulty in understanding why the trial court refused a judgment for plaintiffs.

Mabel E. Clark is the owner of the building in which the apartment is located. On September 17, 1941, she executed a written lease to Dr. Samuel Garrick for the apartment



43367

THE AS. J. COURT and  
JURY ROOM

STATE OF NEW YORK  
COUNTY OF NEW YORK

Defendants,

v.

JOHN GARRICK and DAVID  
GARRICK,

Appellants.

MR. JUSTICE SCARLETT (DELIVERED THE OPINION OF THE COURT).

Thomas J. Scarran and Mary Scarran, Plaintiffs,

brought a forcible entry and detainer suit against  
John Garrick and David Garrick, Defendants, to obtain  
possession of "Apartment No. 3 on the third floor of  
the building located at 234 North Tenth Avenue." The  
case was tried by the court and at the conclusion of the  
evidence for plaintiffs there was a finding in favor of  
defendants. Plaintiffs appeal from a judgment entered  
upon the finding.

Plaintiffs state in their brief: "Why the court  
dismissed the suit and denied plaintiffs a judgment for  
possession is wholly beyond our conception and under-  
standing." Defendants have not filed a brief in this  
court, but as it appeared from the docket that the  
Garrick Garrick was the lessee of the apartment and that  
he is in the armed forces of the Army of the United  
States, attached to the medical corps, we read the entire  
transcript of the record in this case and as a result we  
found no difficulty in understanding why the trial court  
refused a judgment for plaintiffs.

Rebel E. Clark is the owner of the building in which  
the apartment is located. On September 17, 1941, she ex-  
cuted a written lease to Dr. Samuel Garrick for the apartment

in question for the period of one year, and the doctor took possession of the apartment. His father, Rubin Garrick, and his brother, David Garrick, lived with him. Sometime after the doctor took possession of the premises he married, and then David married, and their wives also lived in the apartment. Shortly after the doctor took possession of the apartment he enlisted in the armed forces of the United States, was attached to the medical corps, and went overseas. At the expiration of the term of the said lease no new lease was executed nor was there any formal extension of the written lease. The attorneys for the parties agreed that the doctor was a holdover tenant from year to year after the term fixed in the lease had expired. After the doctor enlisted and left Chicago the rent of the apartment was paid promptly by the doctor's wife and was received by Mrs. Clark up to and including the month of September, 1944. In June and July, 1944, Mrs. Clark asked Rubin Garrick and David Garrick "to renew the lease and to take care of the decorating and get things in shape." She testified that they refused to sign a new lease, stating that the doctor's wife would pay the rent, to which Mrs. Clark responded that she wanted security and that they could not stay if they did not sign a lease. Mrs. Clark stated that the rent was always paid "by the doctor. \* \* \* By the doctor's wife." Rent for the months of October and November, 1944, was tendered to Mrs. Clark by the doctor's wife, but Mrs. Clark refused to accept the same. Mrs. Clark further testified that she never served a notice on the doctor for possession of the premises "because he wasn't occupying them." On September 14, 1944, Mrs. Clark executed a written lease of the apartment to plaintiffs for a period of two years, commencing October 1, 1944. Plaintiffs' claim for possession of the apartment is based upon this



in question for the period of one year, and the doctor took possession of the apartment. His father, Nathan Gorkin, and his brother, David Gorkin, lived with him, sometime after the doctor took possession of the premises he married, and then David married, and their wives also lived in the apartment. Shortly after the doctor took possession of the apartment he enlisted in the armed forces of the United States, was attached to the medical corps, and went overseas. At the expiration of the term of the said lease no new lease was executed nor was there any formal extension of the written lease. The attorneys for the parties agreed that the doctor was a holdover tenant from year to year after the term fixed in the lease had expired. After the doctor enlisted and left Chicago the rent of the apartment was paid promptly by the doctor's wife and was received by Mrs. Clark up to and including the month of September, 1944. In June and July, 1944, Mrs. Clark asked Nathan Gorkin and David Gorkin "to renew the lease and to take care of the decorating and get things in shape." She testified that they refused to sign a new lease, stating that the doctor's wife would pay the rent, to which Mrs. Clark responded that she wanted security and that they could not stay if they did not sign a lease. Mrs. Clark stated that the rent was always paid "by the doctor, or by the doctor's wife." Rent for the months of October and November, 1944, was tendered to Mrs. Clark by the doctor's wife, but Mrs. Clark refused to accept the same. Mrs. Clark further testified that she never served a notice on the doctor for possession of the premises "because he wasn't occupying them." On September 14, 1944, Mrs. Clark executed a written lease of the apartment to plaintiffs for a period of two years, commencing October 1, 1944. Plaintiffs' claim for possession of the apartment is based upon this

lease. They admitted that when they made the lease they knew that there were parties in possession of the apartment (the Scanlans) and that they are still living in the premises that they occupied at the time that they signed the lease. Mrs. Clark's attorney and "agent for the premises," Leslie H. Whipp, represents the plaintiffs in the instant proceeding. He testified that he served the following notice on "the old gentleman," Rubin Garrick, on July 22, 1944:

"To SAMUEL GARRICK, DAVID GARRICK and RUBIN GARRICK:  
Third Apartment  
206 South Hamlin Avenue, Chicago, Illinois

"YOU ARE HEREBY NOTIFIED, That your tenancy of the following premises, to-wit: Apartment No. 3 on the 3rd floor of the building located at 206 South Hamlin Avenue, together with the appurtenances thereto belonging situate in the City of Chicago, in the County of Cook, and State of Illinois, will terminate on the 30th day of September A. D. 1944, and you are now hereby required to surrender possession of said premises to me on that day.

"Dated at Chicago, Illinois, this 21st day of July  
A. D. 1944.

"Mabel E. Clark  
by Leslie H. Whipp her  
Attorney in Fact"

On the back is the affidavit of service on Rubin Garrick. It will be noted that no grounds are set up by the landlady as to why she wishes to terminate the tenancy. Mr. Whipp further stated that Rubin Garrick told him that his son "was away some place in war." Plaintiffs, on October 2, 1944, served upon David Garrick and Rubin Garrick a written demand, dated October 1, 1944, for possession of the apartment. Whipp testified that he "terminated the lease." Plaintiffs' counsel, during the trial and in this court, attempts to excuse their failure to make a demand



lease. They admitted that when they made the lease they  
in view of the fact that they were in possession of the apartment  
(the Scanlans)  
and that they were still living in the premises and that they  
occupied at the time that they made the lease. That  
Clark's attorney and "agent for the Scanlans," Leslie H.  
Whipp, represents the plaintiffs in the instant proceeding.  
He testified that he served the following notice on "the  
old defendant," John G. Gerrick, on July 22, 1944:

"To JOHN G. GERRICK, DAVID GERRICK and JOHN GERRICK:  
This Apartment  
200 South Madison Avenue, Chicago, Illinois  
YOU ARE HEREBY NOTICED, that your tenancy of the

following premises, to-wit: Apartment No. 5 on the 3rd  
floor of the building located at 200 South Madison Avenue,  
together with the appurtenances thereto belonging situate  
in the City of Chicago, in the County of Cook, and State of  
Illinois, will terminate on the 10th day of September A. D.  
1944, and you are now hereby required to surrender possession  
of said premises to me on that day.

"Dated at Chicago, Illinois, this 21st day of July  
A. D. 1944.

Witness my hand and seal  
this 21st day of July 1944  
by Leslie H. Whipp her  
attorney in fact

On the back is the affidavit of service on John  
Gerrick. It will be noted that no grounds are set up by the  
landlady as to why she wishes to terminate the tenancy.  
Mr. Whipp further stated that John Gerrick told him that  
his son "was away some place in war." Plaintiff, on  
October 2, 1944, served upon David Gerrick and John Gerrick  
a written demand, dated October 1, 1944, for possession of  
the apartment. Whipp testified that he "terminated the  
lease." Plaintiff's counsel, during the trial and in this  
court, attempts to excuse their failure to make a demand

upon Dr. Garrick for possession of the apartment upon the ground that Dr. Garrick had abandoned the apartment. Nowhere in the brief of plaintiffs is any mention made of the fact that Dr. Garrick, shortly after he went into possession of the apartment, had enlisted in the armed forces of the United States and had been sent overseas, nor is there any mention of the further fact that the doctor's wife was living in the apartment and had been paying the rent. We are told in the brief that "in December, 1941, Samuel Garrick abandoned the premises in question," that "the original lessee [Dr. Garrick] made no claim to the right of possession and the said defendants, Rubin Garrick and David Garrick, were trespassers on said premises." At the commencement of the trial counsel for defendants called the court's attention to the fact that Dr. Garrick was in court, that he was the signor of the lease, and that he had been in possession of the premises for three years, but that plaintiffs had not seen fit to make him a party to the suit. In response to this statement counsel for plaintiffs stated that he thought the evidence would show that the doctor was never in physical possession of the apartment and that plaintiffs were "seeking possession from the party in possession," to which statement counsel for defendants replied that the doctor was in possession of the apartment and that his furniture was in the apartment. At the conclusion of plaintiffs' evidence counsel for defendants stated that Mr. Kearney, of the O. P. A., was present in court and he would like to have Mr. Kearney state his opinion as to whether the notice of termination of the tenancy was suffi-



upon Mr. Garlick for possession of the apartment upon the  
ground that Mr. Garlick had abandoned the apartment.  
However in the trial of plaintiff's case the court  
of the fact that Mr. Garlick, shortly after he went into  
possession of the apartment, had enlisted in the armed  
forces of the United States and had been sent overseas,  
nor is there any mention of the further fact that the  
doctor's wife was living in the apartment and had been  
paying the rent. It was told in the trial that "in  
December, 1941, when I Garlick abandoned the premises  
in question," that "the only other person (Mr. Garlick)  
made no claim to the right of possession and the said  
defendants, Mr. Garlick and David Garlick, were then-  
passers on said premises." At the commencement of the  
trial counsel for defendants called the court's attention  
to the fact that Mr. Garlick was in court, that he was the  
author of the lease, and that he had been in possession of  
the premises for three years, and that plaintiff had not  
been fit to take him a party to the suit. In response to  
this statement counsel for plaintiff's stated that he  
thought the evidence would show that the doctor was never  
in physical possession of the apartment and that plaintiff's  
were "seeking possession from the party in possession," to  
which statement counsel for defendants replied that the  
doctor was in possession of the apartment and that his  
signature was in the apartment. At the conclusion of  
plaintiff's evidence counsel for defendants stated that  
Mr. Kearney, of the O. P. A., was present in court and he  
would like to have Mr. Kearney state his opinion as to  
whether the notice of termination of the tenancy was well-

cient under the rules and regulations of the O. P. A. As no objection was interposed to Mr. Kearney's making a statement to the court, he stated that according to the rules and regulations of the O. P. A. the notice in question was not a good notice; that according to said rules and regulations a tenant in possession paying rent could not be evicted save under certain circumstances, and that the landlord must state in the notice the reason for the termination of the lease and that he must serve with the O. P. A. a copy of the notice. Counsel for plaintiffs thereupon stated that he was proceeding under the Illinois statutes and that the notice was a compliance with the statutes. Reasonable and legal rules and regulations of the O. P. A. are enforceable, and it is not disputed that said rules and regulations specifically provide: "(d) Notices required - (1) Notices prior to action to remove tenant. Every notice to a tenant to vacate or surrender possession of housing accommodations shall state the ground under this section [Housing, Sec. 6, (4)] upon which the landlord relies for removal or eviction of the tenant. A written copy of such notice shall be given to the area rent office within 24 hours after the notice is given to the tenant." The trial court stated that Dr. Garrick should have been made a defendant in the case, and, in our judgment, the court was fully justified in concluding that plaintiffs were attempting to gain an unfair advantage over him by proceeding solely against Rubin Garrick and David Garrick, who were not parties to the lease between Mrs. Clark and the doctor. Counsel for plaintiffs' statement that the doctor had not been in possession of the apartment "since the latter part of 1941 or the forepart of 1942, so the suit for possession



as a tenant under the lease and regulations of the O. P. A. as  
no objection was interposed to Mr. Kearney's making a  
statement to the court, he stated that according to the  
rules and regulations of the O. P. A. the notice in question  
was not a good notice; that according to said rules and  
regulations a tenant in possession paying rent could not  
be evicted save under certain circumstances, and that the  
landlord must state in the notice the reason for the  
termination of the lease and that he must serve with the  
O. P. A. a copy of the notice. Counsel for plaintiffs  
thereupon stated that he was proceeding under the Illinois  
statutes and that the notice was a compliance with the  
statutes. Reasonable and legal rules and regulations of  
the O. P. A. are enforceable, and it is not disputed that  
said rules and regulations specifically provide: "(4)  
Notices required - (1) Notices prior to action to remove  
tenant. Every notice to a tenant to vacate or surrender  
possession of housing accommodations shall state the ground  
under this section [Housing, Sec. 6, (4)] upon which the  
landlord relies for removal or eviction of the tenant. A  
written copy of such notice shall be given to the area rent  
office within 48 hours after the notice is given to the  
tenant." The trial court stated that Dr. Garrison should  
have been made a defendant in the case, and, in our judgment,  
the court was fully justified in concluding that plaintiffs  
were attempting to gain an unfair advantage over him by  
proceeding solely against Rubin Garrison and David Garrison,  
who were not parties to the lease between Mrs. Clark and the  
doctor. Counsel for plaintiffs' statement that the doctor  
had not been in possession of the apartment "since the latter  
part of 1941 or the forepart of 1942, so the suit for possession

against Samuel Garrick isn't necessary," was not justified by the evidence nor the law.

After a careful study of the record we are satisfied that the judgment of the Municipal Court of Chicago is a just one and should be affirmed.

Since the appeal was perfected in this court a motion was filed on behalf of defendant David Garrick to dismiss the appeal as to him on the ground that he moved from the apartment about March 1, 1945. In support of the motion there was presented an affidavit of Captain Samuel Garrick, which reads as follows:

"Captain Samuel Garrick, being first duly sworn on oath deposes and says, that he is in the armed forces of the Army of the United States, attached to the medical corps, and at present resides at 206 S. Hamlin Avenue, Chicago, Illinois, in the apartment which the plaintiffs-Appellants seek possession.

"That he is the lessee of said apartment, and took possession thereof in October, 1941, and since that time said premises have contained his household effects and furniture; that at the same time his father, Rubin Garrick and his brother, David Garrick went into possession with him.

"That the rent for the apartment has been paid or tendered each and every month since the occupancy by this affiant.

"That within months after entering into this lease, this affiant was called to serve with the armed forces of the United States and while on furloughs or stationed in and around Chicago resided in said premises with his father and brother; that no other lease was entered into



against Samuel Garlick isn't necessary," was not justified

by the evidence nor the law.

After a careful study of the record we are satisfied

that the judgment of the Municipal Court of Chicago is a

just one and should be affirmed.

Since the appeal was perfected in this court a

motion was filed on behalf of defendant David Garlick to

dismiss the appeal as to him on the ground that he moved

from the apartment about March 1, 1945. In support of the

motion there was presented an affidavit of Captain Samuel

Garlick, which reads as follows:

"Captain Samuel Garlick, being first duly sworn on

oath deposes and says, that he is in the armed forces of

the Army of the United States, attached to the Medical

corps, and at present resides at 206 S. Main Avenue,

Chicago, Illinois, in the apartment which the

plaintiffs-appellants seek possession.

"That he is the lessee of said apartment, and took

possession thereof in October, 1941, and since that time

said premises have contained his household effects and

furniture; that at the same time his father, Nathan Garlick

and his brother, David Garlick went into possession with

him.

"That the rent for the apartment has been paid or

tendered each and every month since the occupancy by this

affiant.

"That within months after entering into this lease,

this affiant was called to serve with the armed forces of

the United States and while on temporary or stationed in

and around Chicago resided in said premises with his

father and brother; that no other lease was entered into

between him and the lessor and his tenancy thereby became year to year tenancy with no existing lease but the terms of the original lease nonetheless prevailing.

"That on or about the 5th day of October, A. D., 1942 this affiant was sent out of the territorial limits of the United States and participated in the North African campaign and later in the Sicilian and Italian campaigns and was hospitalized in a Hospital in Rome Italy for many months and returned to the United States in October, 1944 and though he has spent some time in the Vaughn General Hospital, and Percy Jones Hospital he has resided during furloughs and leaves in the rented premises at 206 S. Hamlin Avenue.

"This affiant further states that David Garrick one of the defendants moved from the premises on or about the 1st day of March, A. D., 1945, and in the premises reside this affiant and his father, Rubin Garrick, defendant.

"This affidavit is therefore made to induce the Court to dismiss the cause as to David Garrick, the question having become moot.

"Further this affiant sayeth not.

[Signed] "Captain Samuel Garrick  
"Captain Samuel Garrick"

Plaintiffs filed objections to the motion; they also moved to strike the affidavit signed by Captain Garrick upon the ground that the motion and affidavit is an attempt to supply evidence on behalf of defendants which might have been submitted to the trial court. The affidavit of Captain Garrick seeks to bring to our attention certain alleged facts not shown by the transcript of the evidence, but we have no right to receive or consider additional evidence in passing upon this appeal. (See People ex rel. Rusch v. Ferro, 313



between him and the lessor and his tenancy thereby holding  
year to year tenancy with no existing lease but the terms  
of the original lease notwithstanding.

"That on or about the 15th day of October, 1944,  
1945 this affiant was sent out of the territorial limits  
of the United States and participated in the North American  
campaign and later in the Italian and Italian campaigns  
and was hospitalized in a hospital in Rome Italy for many  
months and returned to the United States in October, 1944  
and though he has spent some time in the Western General  
Hospital, and Percy Jones Hospital he has resided during  
Turin and leaves in the United States at 200 E.  
Kendall Avenue.

"This affiant further states that David Garrick one  
of the defendants moved from the premises on or about the  
1st day of March, 1945, and in the premises reside  
this affiant and his father, Edwin Garrick, defendant.  
"This affidavit is therefore made to induce the  
Court to dismiss the cause as to David Garrick, the question  
having become moot.

"Further this affiant says not.  
[signed] "Captain Samuel Garrick"  
"Captain Samuel Garrick"  
Plaintiffs filed objections to the motion; they also  
moved to strike the affidavit signed by Captain Garrick upon  
the ground that the motion and affidavit is an attempt to  
supply evidence on behalf of defendants which might have  
been submitted to the trial court. The affidavit of Captain  
Garrick seeks to bring to our attention certain alleged facts  
not shown by the transcript of the evidence, but we have no  
right to receive or consider additional evidence in passing  
upon this appeal. (See People ex rel. Wachs v. Ferro, 21)

Ill. App. 202, 229.) The motion to strike the affidavit is sustained, and the motion to dismiss the appeal as to David Garrick is denied. We feel impelled to state, however, that the affidavit, as well as the record in this case, tends to show the wisdom and necessity of the Soldiers' and Sailors' Civil Relief Act of 1940. (See Hellberg v. Warner, 319 Ill. App. 117.) The instant record shows clearly that plaintiffs sought to gain an unfair advantage over Captain Garrick by omitting him as a defendant in the cause. There are circumstances in the case that justify the assumption that plaintiffs were mere dummies for Mrs. Clark. That counsel for plaintiffs should see fit to contend and argue that it was unnecessary to make Captain Garrick a defendant because he abandoned the apartment when he was inducted into the armed forces and went overseas, his wife remaining in the apartment and paying the rent, shocks one's sense of justice.

The judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.



III. App. 202, 222.) The motion to strike the affidavit is sustained, and the motion to dismiss the appeal is to David Gerrick is denied. No fact is held to state, however, that the affidavit, as well as the record in this case, tends to show the wisdom and necessity of the soldiers' and sailors' civil rights act of 1941. (See Helphrey v. Helphrey, 111 Ill. App. 117.) The instant record shows clearly that plaintiff sought to gain an unfair advantage over Captain Gerrick by omitting him as a defendant in the cause. There are circumstances in the case that justify the assumption that plaintiff's move was made for this. That plaintiff sought to gain an unfair advantage and argue that it was unnecessary to make Captain Gerrick a defendant because he abandoned the apartment when he was instructed into the armed forces and went overseas, his wife remaining in the apartment and paying the rent, shocks one's sense of justice.

The judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Delivered, P. J., and written, J. J. Conroy.

43290

SOL GANELLIN,  
Appellee,

v.

HARRY GINSBERG and ANNA GINSBERG,  
his wife, co-partners trading as  
Fidelity Laundry Service,  
Appellants.

APPEAL FROM  
SUPERIOR COURT,  
COOK COUNTY.

326 I.A. 462

PRESIDING  
MR./JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff conducted a hand laundry under the name Uptown Hand Laundry, defendants a steam laundry under the name Fidelity Laundry Service. Both were located in Chicago and about four blocks distant from each other. The business of plaintiff was to collect and receive from individual customers laundry which he in turn delivered to the truck driver agent of defendants, who called for, received and carried it to defendants' steam plant, where it was washed and afterwards returned to plaintiff, who ironed such articles as shirts and wearing apparel and redelivered same to the owners. Plaintiff began this business in April, 1940, and established his relationship with defendants about that time. With two interruptions it continued until October 26, 1942.

Plaintiff began this action at law against defendants October 30, 1942. He filed a complaint of twelve paragraphs, which in substance alleged that while this relationship between plaintiff and defendants existed, defendants by repeated wilful, intentional and malicious disregard of their contractual obligations ruined the business of plaintiff. The action was in tort.

Defendant answered, denying any disregard of contractual obligations and any wilful, intentional or malicious actions with design to hurt the plaintiff.



JOHN J. ...

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3881A 482

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... with design to hurt the plaintiff. ... obligations and any willful, intentional or malicious ... Defendant answered, denying any allegation of contractual ... along raised the business of plaintiff. The motion was in fact, ... intentional and malicious disregard of their contractual obligation ... plaintiff and defendant stated, defendant by repeated willful ... which in substance alleged that while this relationship between ... October 30, 1942. He filed a complaint of twelve paragraphs, ... Plaintiff began this action at the second telephone ... October 28, 1942.

2.

The cause was put at issue and tried by a jury. At the close of all the evidence defendants moved for an instructed verdict in their favor, which was denied. The jury returned a verdict for plaintiff with damages assessed at \$6,065.00 and with a special finding of wilful malice. Defendants moved for judgment in their favor notwithstanding and for a new trial. Plaintiff remitted \$1,000.00. The motions were denied and judgment entered in favor of plaintiff against defendants for \$5,065.00, from which judgment defendants appeal.

Defendants contend the motion at the close of all the evidence to instruct a verdict for defendants should have been given, and that after the verdict motions for judgment for defendants notwithstanding or for a new trial should have been granted.

The action is of an unusual but widening class, wherein a plaintiff sues in tort, alleging violation by a defendant of contractual duties under circumstances creating a tort.

The ill feeling between the parties concerned a bundle of laundry owned by a customer of plaintiff named Appell, which had been delivered to plaintiff and through him to defendants but, it was claimed, not returned. The estimated value of this bundle was \$65.00 and it weighed about fifteen pounds. Search had been made at the Fidelity plant, not wholly successful. On October 28, 1942, plaintiff went to see Mr. Ginsberg at about 4:30 P. M. and asked him why the wash had not been returned on schedule. He says that Ginsberg became angry; asked him why he had sent <sup>him</sup> a lawyer's letter and said he refused to pay the demand. Plaintiff says he explained that he did not send to defendants any lawyer's letter; that Mr. Appell, the customer, had done this, and that Mr. Appell also caused a similar letter to be sent to him. At any rate, Ginsberg told him he refused to pay damages; that he wished plaintiff to assume responsibility



The same was not at issue and held in 1914. At the  
close of all the evidence delivered upon the issue  
which is still open, which was held. The law  
a verdict for plaintiff with damages amounting to \$5,000.00 and  
with a special finding of legal interest. Damages were  
for judgment in favor of defendant and for a new trial.  
Plaintiff received \$1,000.00. The matter was held and  
judgment entered in favor of plaintiff and defendant was  
\$5,000.00, from which plaintiff received interest.  
Plaintiff opposed the action of the close of all the  
evidence to plaintiff a verdict for defendant which was held  
and that after the verdict motion was granted for  
renewal of trial. Judgment for a new trial was granted  
granted.  
The action is an amended one filed on 11/11/14, wherein  
a complaint was filed, stating violation of a contract of  
employment dated 1913, defendant's attorney a copy.  
The ill feeling between the parties continued a matter  
of many years by a witness of plaintiff named Smith, who  
has been delivered to plaintiff and known him to defendant.  
But, it was stated, not returned. The plaintiff paid of the  
plaintiff and \$500.00 and it seemed that the matter was  
not over with at the trial, but was not successful. On  
October 12, 1914, plaintiff went to the court, where at about  
4:30 P. M. he asked him why the case had not been returned  
on appeal. He says that defendant's attorney asked him to  
to that day. Plaintiff's letter and said he refused to pay the  
fees. Plaintiff says he explained that he did not want to  
return the only lawyer's letter; that the matter, the plaintiff  
had some time, and that Mr. Smith also asked a letter, letter  
to be sent to him. At the time, defendant told him he refused  
to pay money; that he asked plaintiff to assume responsibility

3.

of all losses; that he wanted him to put up \$100.00 security and \$50.00 as advance payment for the wash of next week.

Plaintiff says: "I told him that I hadn't got the money, and this is not the custom and practice --- \* \* \* --- of the laundry business. \* \* \* We didn't do it before, and we are not going to do it now. He told me that 'you know you can't go to wash anywhere else, you will have to stay here, and therefore, you will have to give me your order.' I told him that this is not going to be done. If he insists upon he will put me out of business. I will be forced to close because I have no money to give him, and I have no other place for it to go to. He said he don't care. This is the ruling, this is the way he wanted it to be done. That was about the substance of the conversation. I have given it all to you."

Plaintiff says there was a custom or practice in the City of Chicago at that time of tying the hand laundries to the steam laundries. He says: "No laundry man could go away from one wholesale steam plant to another." He further testified that when he had this conversation with Gansberg, Gansberg held twenty-six of his customers' bundles, "all the wash I sent out from Tuesday to Friday." He says that after <sup>that</sup> Thursday he did not get these bundles of laundry; that instead of bringing the laundry on Saturday, as usual, the driver came empty; that on Saturday he had a very bad day, the customers all came and demanded their laundry, and he had no excuse to give them; that on Saturday afternoon he tried to contact other steam plants; that he called four different laundries, which refused to pick up his laundry; that he could not pick up new wash because he had no place to send it; that he didn't call Gansberg on Monday. The driver came on that day to pick up wash but still did not bring the previous wash. About 4:30 the driver called up and asked him if he had the money to pay for the bundles and if he did he would



of all losses; that he wanted him to put up \$100.00 security

and \$50.00 as advance payment for the week of next week.

Plaintiff says: "I told him that I hadn't got the money, and

this is not the custom and practice --- \* \* \* of the laundry

business. \* \* \* He didn't do it before, and we are not going to

do it now. He told me that 'you know you can't go to work

anywhere else, you will have to stay here, and therefore, you

will have to give me your order.' I told him that this is not

going to be done. If he insists upon he will get me out of

business. I will be forced to close because I have no money

to give him, and I have no other place for it to go to. He said

he don't care. This is the thing, this is the way he wanted it

to be done. That was about the substance of the conversation. I

have given it all to you."

Plaintiff says there was a custom or practice in the City

of Chicago at that time of giving the hand laundry to the

steam laundries. He says: "The laundry man could go away

from one wholesale steam plant to another." He further testified

that when he had this conversation with Gansberg, Gansberg told

twenty-six of his customers' bundles, "all the work I sent out

from Tuesday to Friday." He says that after Thursday he did not

get these bundles of laundry; that instead of bringing the

laundry on Saturday, as usual, the driver came empty; that on

Saturday he had a very bad day, the customers all came and demanded

their laundry, and he had no excuse to give them; that on Saturday

afternoon he tried to contact other steam plants; that he called

four different laundries, which refused to pick up his laundry;

that he could not pick up new work because he had no place

to send it; that he didn't call Gansberg on Monday. The driver

came on that day to pick up work but still did not bring the

previous work. About 4:30 the driver called up and asked him if

he had the money to pay for the bundles and if he did he would

4.

bring over the laundry in the evening. On Saturday he asked his attorney for advice, and the attorney called Ginsberg. On Monday, about 5:00 o'clock, the driver with the foreman brought him all the laundry for the whole week and presented him a bill for two weeks. He told them the check for the previous week was still on the spindle; that they could take that and for the next week he would check up and see if it was all right; that they would find a check a day or two later, and he paid the balance of the bill later. He says: "After that I did not stay any more in business."

This is in substance plaintiff's own story. It falls short of proof from which design to put plaintiff out of business can be inferred. In the first place, the whole evidence shows there could be no motive for this on the part of defendants. Their business with plaintiff had been profitable, apparently, to both of them. The driver did not refuse to call for plaintiff's laundry for the week ending Saturday, October 24, 1942. Plaintiff's "wet wash" was delivered on scheduled time. Plaintiff so testified. True, there were twenty-six bundles of "flat work" laundry which, by the schedule, should have been delivered to plaintiff on Saturday, October 24, 1942. These were not delivered until Monday, October 26, 1942, one business day late. "Lucky", most of us would say in these times.

Plaintiff relies on Doremus v. Hennessy, 176 Ill. 608, and Carlson v. Carpenter Contractors' Ass'n., 305 Ill. 331, cases clearly distinguishable in that the malevolent motives were in those cases quite apparent and the action based on an alleged conspiracy. See also Judevine v. Benzie-Montanye Fuel and Warehouse Co., 222 Wis. 512, 269 N. W. 295. The distinction is pointed out in Osgoodby v. Talmadge, 45 Fed. (2d) 696.

We hold the instruction requested in favor of defendants at the close of all the evidence should have been given and the



bring over the laundry in the evening. On Saturday he called his attorney for advice, and the attorney called Ginsberg. On Monday, about 5:00 o'clock, the driver with the laundry brought him all the laundry for the whole week and presented him a bill for two weeks. He told him the check for the previous week was still on the window; that they could take that and for the next week he would check up and see if it was all right; that they would find a check a day or two later, and he paid the balance of the bill later. He says: "After that I did not hear any more in business."

This is an undenied plaintiff's own story. It falls short of proof from which to put plaintiff out of business can be inferred. In the first place, the whole evidence shows there could be no motive for him on the part of defendants. Their business with plaintiff had been profitable, apparently, to both of them. The driver did not refuse to call for plaintiff's laundry for the week ending Sunday, October 25, 1942. Plaintiff's "yet and" was delivered on scheduled time. Plaintiff so testified. True, there were twenty-six bundles of "flat" laundry which, by the schedule, should have been delivered to plaintiff on Saturday, October 24, 1942. These were not delivered until Monday, October 26, 1942, one business day late. "Monday", not at as would be in these times.

Plaintiff relies on Dorman v. Henshaw, 179 Ill. 608, and Harlan v. Carpenter Contractors' Ass'n, 303 Ill. 381, cases clearly distinguishable in that the relevant motives were in those cases quite apparent and the action based on an alleged conspiracy. See also Judette v. Chicago-Hastings Fuel and Carbon Co., 232 Ill. 512, 230 N.W. 235. The distinction is pointed out in Grady v. Talmage, 37 Fed. (2d) 686. We hold the instruction requested in favor of defendants at the close of all the evidence should have been given and the

5.

motion for judgment notwithstanding the verdict, after the return of it, should have been allowed. For these errors the judgment will be reversed.

REVERSED.

Niemeyer, J., and O'Connor, J., concur.



3.

motion for judgment notwithstanding the verdict, after the  
return of it, should have been allowed. For these reasons  
the judgment will be reversed.

REVEREND

Wheeler, J., and O'Connor, J., concur.

43313

JOHN A. SCHILLO, as Administrator of  
the Estate of John A. Schillo, Deceased,

Appellant,

v.

CITY OF CHICAGO,

Appellee.

Appeal from

Superior Court,

Cook County.

3261A 463

PRESIDING

MR./JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action under the statute by the administrator for the benefit of the next of kin for alleged negligence causing the death of deceased, on trial by jury there was a verdict for defendant. Motions by plaintiff for a new trial and for judgment notwithstanding were overruled and judgment entered on the verdict, from which plaintiff appeals.

It is urged for reversal the verdict is against the manifest weight of the evidence; that the court erred in its rulings in admitting evidence offered by defendant, and that erroneous instructions were given to the jury at defendant's request.

The accident on which the action is based occurred about 4:30 A.M., March 1, 1942, on Chicago Avenue in the City of Chicago. It is an east and west street, near to and east of Halsted Street, which extends north and south. At the point where the accident occurred the avenue passes over the tracks of the Chicago and North Western Railroad at a level of about 17 feet above the ground. The railroad was then operated by Charles M. Thomson, Trustee. He was made defendant but dismissed out of the action on motion of plaintiff.

In the center of the avenue, about 2 feet 4 inches high and 1 foot wide, was a steel girder or abutment, as it is sometimes called. It is the theory of the plaintiff that on the morning in question, while yet dark, the intestate, driving his automobile in



JOHN A. HUNTER, as Administrator of the Estate of JOHN A. HUNTER, deceased,

Plaintiff,

v.

THE CHICAGO & NORTH WESTERN RAILROAD COMPANY,

Defendant.

PRESIDING

U.S. DISTRICT COURT, DISTRICT OF COLUMBIA, at Washington, D.C.

In an action under the statute by the administrator for the benefit of the next of kin for alleged negligence causing the death of deceased, on trial at law there was a verdict for defendant. Motion by plaintiff for a new trial was for judgment notwithstanding the verdict and judgment entered on the verdict, from which plaintiff appeals.

It is urged for reversal the verdict is against the merits and weight of the evidence; that the court erred in its ruling in admitting evidence offered by defendant, and that erroneous instructions were given to the jury of defendant's request. The accident on which the action is based occurred about 10:15 a.m., March 1, 1921, on Chicago Avenue in the City of Chicago. It is on West 10th Street, near to and east of Belmont Street, which extends north and south. At the point where the accident occurred the avenue crosses over the tracks of the Chicago and North Western Railroad at a level of about 17 feet above the ground. The railroad was then operated by Charles W. Thompson, Trustee. He was a defendant but dismissed out of the action on motion of plaintiff.

In the center of the avenue, about 7 feet 4 inches high and 1 foot wide, was a steel girder or support, as it is sometimes called. It is the theory of the plaintiff that on the morning in question, while yet dark, the defendant, driving his automobile in

Special Term  
District Court  
U.S. District

3281A-463

a westernly direction in the exercise of due care, collided with this girder or abutment and died as a result of the injuries received. It is argued the defendant City was negligent in constructing, maintaining and, in particular, in failing to guard the girder, or to place signs or lights to warn of its presence, and because of this negligence is liable. The complaint so alleged.

The answer of the City denied any negligence in respects alleged, and it is vigorously argued plaintiff wholly failed to show the deceased at the time he was injured was in the exercise of due care for his own safety.

A plat of the viaduct over which the street ran and a series of photographs are in evidence, showing the condition of the street and the viaduct at the time of the accident. The distance from the east end of the girder to the west end of it is 580 feet.

The deceased was driving his automobile west on this street, approaching the viaduct. The girder was a part of the viaduct and supported the surface of the street. Approaching the girder or abutment from the east was like driving up hill. Chicago Avenue at this point from curb to curb is 42 feet wide. From the edge of the girder to the curb is 20 feet 6 inches. On each side of the girder was a wooden guard about 6 by 6 inches. The girder was of a dark muddy color. There were no electric signs or lights of any kind on the east end of the girder, nor sign warning of danger. Trains passed under the viaduct, from which smoke was often emitted, rising to the street above. The nearest street light to the girder was 16 feet east from the east end of it set on a pole. Measured diagonally the light was 26 feet from the east end of the abutment. The street lights were 6,000 lumens or 478 candle power. The lamps were on the top of poles 22 feet high. The lights were in frosted globes under an enamel white surface shade, approximately 2 feet in diameter. There was no globe to the lamp, just a frosted bulb. There were other lights of similar kind



The witness was driving his automobile west on this  
 street, approaching the intersection. The witness was a part of the  
 witness and reported the position of the witness, approaching the  
 intersection from the east and like driving up hill. Chicago  
 Avenue at this point runs east to west is 40 feet wide. From the  
 edge of the gutter to the curb is 10 feet 3 inches. On the east side  
 of the gutter was a wooden curb about 6 by 6 inches. The gutter  
 was of a dark muddy color. There were no electric signs or lights  
 of any kind on the east end of the gutter. From the corner of  
 the gutter, turning past the street, from which corner was  
 given called, rising to the street above. The witness stated  
 light in the gutter was 10 feet from the curb and 10 feet  
 on a pole. Numerous diagonally the light was 20 feet from the  
 west end of the gutter. The street lights were 2,000 lamps on  
 475 candle power. The lamps were on the top of poles 22 feet high.  
 The lights were in frosted glass when an animal would enter  
 street, approximately 10 feet in diameter. There was no glass on the  
 lamp, just a frosted bulb. There were other lights of similar kind

3

and like power along the street on similar poles.

The steel girder stood in the center of the street. There were street car tracks on each side over which cars ran east and west.

The deceased left his home in his father's Plymouth automobile, in good health, mentally and physically. He was twenty-five years of age, lived with his parents and managed a manufacturing business for his father. He had a grammar and high school education with further technical training at night schools. The father estimates the worth of his services at \$5,000.00 per year. The deceased left home on the Saturday evening before the accident to meet a young lady friend. He was alone when the accident occurred on early Sunday morning. Just ahead of him was another automobile, driven by Sam Polokoff and occupied by the driver and three other young folks returning from a sorority party on the South Side of Chicago.

Polokoff estimates the speed at which the deceased was driving at from 25 to 40 miles an hour. He says Schillo honked his horn, indicating he wished to pass. Polokoff says he heard Schillo "gunning" his motor, meaning that he was adding more gas to his accelerator. Polokoff turned to the right, moving over to the north side of the street. Schillo passed him and Polokoff heard a crash. Schillo's automobile hit the abutment squarely and moved a distance on top of it estimated by the witnesses at from 20 to 30 feet. It was wrecked. The deceased was covered with blood. Police assistance was called and arrived in a few minutes. Deceased was unconscious and taken to the County Hospital, where he passed away the next day.

Defendant argues the decedent was guilty of contributory negligence, which precludes recovery.

We have read the evidence. The case was well tried. We





cannot hold the verdict to be against the manifest weight of the evidence. As a matter of fact, there is little conflict in it on material points. The girder had been built and was in use for more than fifty years. The case was simple on the facts. The evidence shows without dispute that there was no special light on the east end of the abutment, no guard and no sign of warning. However, assuming the jury might properly have found that there ought to have been such special light or guard or warning, and assuming the city was negligent in these respects, nevertheless the jury could have reasonably found for defendant on the theory that the intestate was himself guilty of negligence which proximately contributed to his own injury.

The witness Scott was a locomotive engineer. From the position in which he was he saw both the automobiles as they approached the abutment. He testified that in his opinion both were moving at a speed of 50 miles an hour. His testimony is corroborated in so far as the deceased is concerned by the distance the Plymouth automobile moved after striking the abutment. Testimony as to physical facts of that kind might well be more persuasive with the jury than the mere opinion of a number of witnesses. We hold the questions of the negligence of defendant and the contributory negligence of the plaintiff were both clearly for the jury.

Much complaint is made of defendant's instruction No. 13. After stating the plaintiff is required by law to prove his case by a preponderance of the evidence, it adds:

"If the plaintiff in this suit has not so proven his case, or if the evidence is evenly balanced so that the jury are in doubt and unable to say on which side is the preponderance, or if the preponderance of the evidence is in favor of the defendants, then, in either of these cases, the verdict should be not guilty."

The instruction was approved by the Supreme Court in Chicago Union Traction Co. v. Mee, 218 Ill. 9. In Nosko v. O'Donnell, 260 Ill. App. 544, this court held it reversible error





to refuse to give it. It is criticized as "highly argumentative and palpably so"; as directing a verdict of not guilty but not referring "to the specific charges of negligence made"; that "the jury could not know what was the plaintiff's case but were required to speculate or guess what it was." These are without merit.

Complaint is also made of defendant's instruction No. 15.

It is:

"The court instructs the jury that if you believe from a preponderance of the evidence that the plaintiff was injured as the result of an accident which occurred without the negligence of either of the plaintiff or of the defendant, then you are instructed the plaintiff can not recover and you should find the defendant not guilty."

It was held erroneous to give this instruction for the plaintiff in Streeter v. Hunrichouse, 357 Ill. 234, where there was no evidence to support it. There a judgment for plaintiff was reversed for that reason. The situation is quite different here.

Instruction No. 16 is complained of. It concerns the question of due care. In particular, plaintiff says, it told the jury the care exercised "must be proportionate to the danger, if any, known to the plaintiff or ascertainable by the exercise of ordinary care and exercised with reference to the situation and position which such person is about to take or in which such person finds himself." This is said to be followed by No. 17, given at the request of plaintiff, which tells the jury that if both the decedent and defendant were guilty of negligence there could be no recovery. It is argued this instruction, thus given, put upon the decedent the duty to anticipate and look out for the negligence of the defendant in obstructing the street, and that if he did not do so, he likewise would be guilty of negligence and could not recover, while the failure to light or guard the girder with warning signals made it impossible for him to protect himself against defendant's negligence. As we read



to refuse to give it. It is criticized as "highly prejudicial" and "highly biased" as directed a verdict of not guilty was returned. "to the specific charges of negligence"; that "the jury could not know what was the defendant's duty and what he was to speculate or guess what it was." These are ground rules. Complaint is also made of defendant's instruction No. 15.

"The jury instructs the jury that it is to believe that a negligence of the defendant that the plaintiff was injured as the result of an accident which occurred while the negligence of either of the plaintiff or of the defendant, and you are instructed the plaintiff can not recover and the jury has the duty to decide the liability."

It was said elsewhere in this case that the instruction in Ex parte v. Montgomery, 247 Ill. 232, where there was evidence to support it. There a judgment for plaintiff was reversed for that reason. The situation is quite different here. Instruction No. 15 is contained in it. It concerns the question of the case. In Ex parte v. Montgomery, it was said that the case involved "what is a determination of the facts, it was said that the plaintiff or defendant is the master of the situation and was acquainted with the facts as the situation and position which the person is about to take in the event of an accident. It is said to be followed by No. 15, given as the reason of the instruction, which says the jury has the duty to decide and the about were guilty of negligence there could be no recovery. It is said this instruction, (how given, and upon the meaning the duty anticipated and laid out for the negligence of the defendant in directing the jury, and that it is not to be, in the opinion of the court, of negligence and could not recover, while the failure to give the jury with proper signals made it impossible to give the proper signals against defendant's negligence. It was said

the evidence of Polokoff and Scott, the record is not to this effect. On the contrary, this issue was for the jury as to whether plaintiff should have seen the girder before running into it. Moreover, we hold the rule laid down by the Supreme Court in C. B. & Q. R. R. Co. v. Warner, 108 Ill. 538, 554, is applicable here:

"Where the reviewing court can see the case has been fairly tried, and that the judgment is clearly right upon the facts, and that consequently another trial must necessarily result the same way, it will not reverse on the ground an erroneous instruction may have been given or a proper one has been refused."

This case in its facts was simple. It was not one in which a jury would be easily misled as to the issues, which were plain and clear.

Objection is made that a resolution of the City Council, relating to the construction of the viaduct in question, was admitted in evidence. There was no question on the trial that the abutment was constructed and maintained by the authority of the City. Even if there was technical error in admitting this evidence, it was harmless.

The judgment will be affirmed.

AFFIRMED..

Niemeyer, J., and O'Connor, J., concur.



the statement of Tolstoy and others, the record is not to this effect.  
In the present, this record was not put in to show plaintiff  
should have been given notice of the same. However, we  
old the rule said in the case of Tolstoy and others, 211 U.S. 267, 274.  
Citing, 100 U.S. 254, 255, is applicable here:

"When the evidence shows that the defendant is  
guilty of the crime, and that the defendant is  
clearly right upon the facts, and that the  
evidence is such that it is necessary to  
find the defendant guilty, it will not be  
an error to find the defendant guilty and  
to award the defendant the punishment."

This case in the facts was simple. It was not one in  
which a jury would be easily misled as to the facts, which were  
plain and clear.  
The record is made from a recitation of the facts, and  
referring to the construction of the record in question, and the  
total is evidence. There was no question as to the facts that the  
defendant was convicted and sentenced by the majority of the  
jury. It is there that the defendant's conviction is established, and evidence,  
and the record.

The judgment was affirmed.

ATTORNEYS

For the defendant, J. J. O'Connell, Jr., counsel.

43341 ) Consolidated.  
43346 )

326 I.A. 464

PEOPLE OF THE STATE OF ILLINOIS,  
Defendant in Error,

v.

ERNEST JOHNSON,  
Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By leave of court Charles Bradbury filed a verified information charging that the defendant, Ernest Johnson, on the first of November, 1944, "did unlawfully, knowingly and wilfully encourage Gail Bradbury a female person under the age of 18 years to-wit: 8 years of age to be or to become a delinquent child and did then and there unlawfully, knowingly and wilfully do acts which directly produced, promoted and contributed to conditions which tended to render said Gail Bradbury to be or to become a delinquent child in that he, the said Ernest Johnson did commit an indecent act on the person of the said Gail Bradbury" in violation of section 2, par. 104, ch. 38, Ill. Rev. Stat. 1943.

The same charge was made by Helen C. Sanders, in an information filed against the defendant, Ernest Johnson, naming Jean Sanders, who was 8 years of age, in the identical language used against him in the information above mentioned.

The informations were filed November 6, 1944, and on that date the court entered an order reciting that Johnson had been arrested without warrant and was present in open court, etc. The order then recites that "Now come the people by the State's Attorney and the defendant as well in his own proper person as by counsel also comes" and the defendant being arraigned, entered a plea of



43341 ) Consolidated,  
43342 )

3281A.484

PEOPLE OF THE STATE OF ILLINOIS,  
Defendant in Error,

v.

ELMER JOHNSON,  
Plaintiff in Error.

STATE TO WHOLESALE COURT  
OF CHICAGO.

MR. JUSTICE GILBERT delivered the opinion of the court.

By leave of court Charles Bradley filed a verified statement charging that the defendant, Elmer Johnson, on the first of November, 1914, "did unlawfully, knowingly and wilfully encourage said Bradley a female person under the age of 18 years to-wit: 8 years of age to be or to become a delinquent child and did then and there unlawfully, knowingly and wilfully do acts which directly produced, promoted and contributed to commission which tended to produce said Bradley to be or to become a delinquent child in that he, the said Elmer Johnson did commit an indecent act on the person of the said Bradley" in violation of section 2, part 104, ch. 58, Ill. Rev. Stat. 1913.

The same charge was made by Helen G. Sanders, in an information filed against the defendant, Elmer Johnson, naming John Sanders, who was 3 years of age, in the identical language used against him in the information above mentioned.

The informations were filed November 2, 1914, and on that date the court entered an order reciting that Johnson had been arrested without warrant and was present in open court, etc. The order then recites that "Now come the people by the state's attorney and the defendant as well in his own proper person as by counsel also come" and the defendant being arraigned, entered a plea of

2.

not guilty. That the court duly advised him of his right to a trial by jury and that he elected to waive a jury trial and by agreement the matter was submitted to the court for trial without a jury. And after hearing the testimony of the witnesses and argument of counsel, the court found defendant guilty as charged in the information and that he was guilty of the criminal offense of contributing to the delinquency of the child, and it was adjudged that he be confined in the House of Correction for one year. This was the sentence imposed in each case and it was ordered that the sentences run concurrently.

Writs of error were sued out in each case and counsel for defendant says that "the Informations do not charge an offense under the Statute because of failure to allege specific acts," and a number of authorities are cited, discussed and applied. The evidence taken on the trial is not in the record. On the other side, the State's Attorney contends that similar informations based on the same statute have been held sufficient in this court, citing People v. Wallace, 185 Ill. App. 213, (Abst.); People v. Walker, 305 Ill. App. 500, (Abst.); People v. Billow, 307 Ill. App. 549, (Abst.), (affirmed in 377 Ill. 236) and other cases. Defendant was charged with violating Par. 104, §2, ch. 38, Ill. Rev. Stats, 1943, which provides that "Any person who shall knowingly or wilfully cause, aid or encourage \*\*\* any female under the age of eighteen (18) years to be or to become a delinquent child as defined in section one (1), or who shall knowingly or wilfully do acts which directly tend to render any such child so delinquent \*\*\* shall be deemed guilty of the crime of contributing to the delinquency of children \*\*\*." And Par. 103, §1 of the act provides in part that a delinquent child is any female who under the age of 18 years "is guilty of indecent or lascivious conduct." In each of the informations the two little girls involved were 8 years of age.



not guilty. That the court only advised him of his right to a trial by jury and that he elected to waive a jury trial and by agreement the matter was submitted to the court for trial without a jury. And after hearing the testimony of the witnesses and argument of counsel, the court found defendant guilty as charged in the information and that he was guilty of the criminal offense of contributing to the delinquency of the child, and it was adjudged that he be confined in the House of Correction for one year. This was the sentence imposed in each case and it was ordered that the sentences run consecutively.

Wife of error was tried out in each case and returned for defendant says that "the informations do not charge an offense under the statute because of failure to allege specific acts," and a number of authorities are cited, discussed and applied. The evidence taken on the trial is not in the record. On the other side, the State's Attorney contends that similar informations based on the same statute have been held sufficient in this court, citing People v. Wallace, 185 Ill. App. 211, 212 (1907); People v. Alter, 305 Ill. App. 500, 501 (1907); People v. Elliot, 307 Ill. App. 542, 543 (1907); (affirmed in 307 Ill. 250) and other cases. Defendant was charged with violating Sec. 104, Ch. 38, Ill. Rev. Stat., 1905, which provided that "any person who shall knowingly or willfully cause, aid or encourage any female under the age of sixteen (16) years to be or to become a delinquent child as defined in section one (1), or who shall knowingly or willfully do acts which directly tend to render any such child so delinquent" shall be deemed guilty of the crime of contributing to the delinquency of children." and Sec. 105, §1 of the act provides in part that a delinquent child is any female who under the age of 18 years is guilty of innocent or lascivious conduct.

In each of the informations the two little girls involved were 8 years of age.

3.

In the Billow case (307 Ill. App. 549,) it was contended that the information was insufficient which charged that defendant "did then and there unlawfully, knowingly and willfully cause, aid and encourage Marvin Dupont Wilson" a male child under the age of 17 years "to be or to become a delinquent child, and did knowingly and willfully do acts which directly tended to render 'such a child a delinquent child,' in violation of par. 104, ch. 38 of the Illinois Statutes, 1937." The court held the objection untenable and said: "It is urged that the information fails to charge a crime because it fails to set out what particular acts, in any, defendant committed. People v. Ellis, 185 Ill. App. 417, and similar cases are relied on. The information here was in the language of the statute, and this was held to be sufficient in People v. Wallace, 185 Ill. App. 214. A similar ruling was made by this court in People v. Walker, (Opinion abstracted) 305 Ill. App. 500."

In the instant cases no motion was made to quash the informations nor was a bill of particulars asked and we think it obvious that the defendant clearly understood the charges made against him. The informations charged that defendant committed an indecent act on the persons of the two 8 year old girls. And as said in People v. Friedrich, 385 Ill. 175-179: "The words 'obscene' and 'indecent' are words of common usage and are ordinarily used in the sense of meaning something offensive to the chastity of mind, delicacy and purity of thought, something suggestive of lustfulness, lasciviousness and sensuality. It is a well-established rule that in the application of a statute, the words are to be given their generally-accepted meaning, unless there is something in the act which indicates that the legislature used them in a different sense \*\*\*."



In the Billow case (307 Ill. App. 243), it was contended

that the information was immaterial which charged that defendant "did then and there unlawfully, knowingly and wilfully cause, aid and encourage Harvey Rupert Wilson, a male child under the age of 17 years, to go on to become a delinquent child, and did so wilfully and wilfully so acts which directly tended to render such a child a delinquent child," in violation of par. 104, ch. 38 of the Illinois Statutes, 1957. The court held the objection untenable and said: "It is urged that the information fails to charge a crime because it fails to set out what particular act, in any, defendant committed. People v. Miller, 136 Ill. App. 217, and other cases are relied on. The information here was in the language of the statute, and this was held to be sufficient in People v. Miller, 136 Ill. App. 217, a similar ruling was made by this court in People v. Miller, (Opinion unpublished) 303 Ill. App. 250."

In the instant case no motion was made to quash the information was a bill of particulars asked and we think it certain that the defendant clearly understood the charges made against him. The information charged that defendant committed an indecent act on the persons of the two 8 year old girls. As we said in People v. Miller, 303 Ill. App. 250-251: "The words 'indecent' and 'indecent' are words of common usage and are ordinarily used in the sense of meaning something offensive to the chastity of mind, decency and purity of thought, containing suggestive of lasciviousness, lasciviousness and sensuality. It is a well-established rule that in the application of a statute, the words are to be given their generally-accepted meaning, unless there is something in the act which indicates that the Legislature used them in a different

4.

In these circumstances we think the contention of the defendant cannot be sustained. The judgment of the Municipal court in each case is affirmed.

JUDGMENTS AFFIRMED.

Niemeyer, F.J., and Matchett,<sup>R</sup><sub>v</sub> J., concur.



In these circumstances we think the contention of the  
defendant cannot be sustained. The judgment of the Municipal  
Court in each case is affirmed.

JUDGMENT AFFIRMED.

Wisever, K. J., and Gatchett, J., concur.

43356

JANE HIRSCH,

v.

LEO PAUL HIRSCH,

LEO PAUL HIRSCH,  
Appellant.

v.

PHILEPPA WEINSTEIN,  
Appellee.

APPEAL FROM  
CIRCUIT COURT,  
COOK COUNTY.

326 I.A. 465

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

March 23, 1943, Jane Hirsch filed her complaint for divorce against Lwo Paul Hirsch alleging that they were married in Chicago April 29, 1941, and lived together until February 27, 1943; that Thomas Stevens Hirsch was born to them August 24, 1942. Defendant was charged with cruelty. Plaintiff prayed that she be given the custody of the child. Defendant filed an answer denying the charges made against him and March 26, a stipulation was filed that the cause might be heard as a default matter. On the same day an order was entered setting the case for hearing on March 31. April 9, a decree was entered granting plaintiff a divorce and the care, custody and control of the child; defendant was given leave to visit the child at reasonable times; alimony was waived and the question of the support of the child was reserved for further consideration.

October 11, 1943, defendant filed his verified petition in which he set up the entry of the decree of divorce; that at the time, the minor child of the parties was 7 months old; that defendant was given the right to visit the child; that since the decree was entered plaintiff had remarried and was living at



JANE HIRSCH,

v.

LEO PAUL HIRSCH.

LEO PAUL HIRSCH,

Appellant.

v.

PHILIP HIRSCH,  
Appellee.APPEAL FROM  
CIRCUIT COURT,  
COOK COUNTY.

3861A.485

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

March 23, 1943, Jane Hirsch filed her complaint for divorce against Leo Paul Hirsch alleging that they were married in Chicago April 29, 1941, and lived together until February 27, 1943; that Thomas Stevens Hirsch was born to them August 24, 1942. Defendant was charged with cruelty. Plaintiff prayed that she be given the custody of the child. Defendant filed an answer denying the charges made against him and March 25, a stipulation was filed that the cause might be heard as a default matter. On the same day an order was entered setting the case for hearing on March 31. April 2, a decree was entered granting plaintiff a divorce and the care, custody and control of the child; defendant was given leave to visit the child at reasonable times; alimony was allowed and the question of the support of the child was reserved for further consideration. October 11, 1943, defendant filed his verified petition in which he set up the entry of the decree of divorce; that at the time, the minor child of the parties was 7 months old; that defendant was given the right to visit the child; that since the decree was entered plaintiff had remarried and was living at

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Biloxi, Mississippi; that plaintiff's mother, Mrs. Weinstein, had assumed control of the child and refused to allow defendant to take him to his own home several times during the week. That the child's grandmother told petitioner that plaintiff, the mother of the child, had told the grandmother she could have control of the child. Petitioner further averred that being the father of the child he "has a prior claim" to the child but was willing to allow the grandmother to retain its custody providing petitioner was given the right to take the child twice a week, etc. On the same day the court entered an order giving defendant leave to take the minor child for certain hours on Saturdays and Sundays. Apparently there was no objection to this order.

September 21, 1944, the affidavit of Jane Bier, formerly Jane Hirsch, was filed by defendant, in which she referred to the decree of divorce; that the custody of the child, who was then 2 years old, had been awarded to her; that plaintiff had remarried and had allowed the minor child to remain with plaintiff's mother, Mrs. Weinstein, and plaintiff asked that the decree be modified to grant the custody of the child to his father, with the right of plaintiff to visit the child at reasonable times.

On the same day, defendant filed his petition setting up the decree of divorce, etc., the remarriage of the child's mother; that the child was placed in the home of the grandmother, Mrs. Weinstein; and alleging that defendant had received many letters from the plaintiff that she would like to have the decree modified and had forwarded to him the affidavit above mentioned. On the same day an order was entered granting Mrs. Weinstein leave to file an answer to the petition. October 3, 1944, she filed her answer in which she set up that she was the



Eliza, Plaintiff's mother, Mrs. Weinstein, had assumed control of the child and refused to allow defendant to take him to his own home several times during the week. That the child's grandmother was petitioner's mother, the mother of the child, had told the grandmother and could have control of the child. Petitioner further averred that being the father of the child he "has a prior claim" to the child but was willing to allow the grandmother to retain its custody providing petitioner was given the right to take the child twice a week. On the same day the court entered an order giving defendant leave to take the minor child for certain hours on Saturdays and Sundays. Apparently there was no objection to this order. September 21, 1944, the affidavit of Jane River, formerly Jane River, was filed by defendant, in which she referred to the decree of divorce; that the custody of the child, who was then 2 years old, had been awarded to her; that Plaintiff had remarried and had allowed the minor child to remain with Plaintiff's mother, Mrs. Weinstein, and Plaintiff asked that the decree be modified to grant the custody of the child to his father, with the right of Plaintiff to visit the child at reasonable times. On the same day, defendant filed his petition setting up the decree of divorce, etc., the residence of the child's mother; that the child was placed in the home of the grandmother, Mrs. Weinstein; and alleging that defendant had received many letters from the Plaintiff that she would like to have the decree modified and had forwarded to him the affidavit above mentioned. On the same day an order was entered granting Mrs. Weinstein leave to file an answer to the petition. October 1, 1944, she filed her answer in which she set up that she was the

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mother of plaintiff and the grandmother of the minor child who was then a little over 2 years of age; that since the marriage of plaintiff and defendant in 1941, she had contributed \$100 per month to the support of the couple and continued to do so until February 27, 1943, when defendant abandoned plaintiff. That the child was born August 24, 1942; that the father and mother were unable to pay the necessary medical and hospital expenses and that she was obliged to do so. Since the birth of the child she had employed a nurse to take care of him at \$25 per week; that when he was about 3 months old defendant informed her he was going to go into the Army and gave up the apartment occupied by him and plaintiff and that thereupon she moved into a larger apartment in order to accommodate plaintiff, defendant and the child, where they lived until February 27, 1943; that defendant agreed to pay \$17.50 towards the support of the child but had wholly failed to do so. That in the decree of divorce the question of support of the child was reserved because the respondent has at all times supported the child. That during all the time the only contributions made by defendant towards the support of the child were a few minor articles of clothing. That on June 1, 1943, "plaintiff remarried for the third time and moved to Mississippi, abandoning the minor child to the care and custody of this respondent," and since the remarriage, plaintiff had visited the child only about 3 times and never made any contribution towards the child's support. The answer further set up that about October 11, 1943, defendant filed his petition, as above stated, for the purpose of visiting the child (and made no objection to respondent's custody, care and maintenance of the child) which request of defendant was granted by the respondent. That defendant failed to visit the child except on a few occasions at such times as were detrimental to its welfare, etc. That plaintiff and defendant had



mother of plaintiff and the grandmother of the minor child who was then a little over 2 years of age; that when the marriage of plaintiff and defendant in 1941, the defendant contributed \$1.00 per month to the support of the couple and continued to do so until February 27, 1943, when defendant abandoned plaintiff. That the child was born August 4, 1941; that the father and mother were unable to pay the necessary medical and hospital expenses and that one was obliged to do so. Since the birth of the child she had employed a nurse to take care of him at \$25 per week; that when he was about 2 months old defendant informed her he was going to go into the Army and leave up the apartment occupied by him and plaintiff and that thereafter she moved into a larger apartment in order to accommodate plaintiff, defendant and the child, where they lived until February 27, 1943; that defendant agreed to pay \$15.00 towards the support of the child but had wholly failed to do so. That in the decree of divorce the question of support of the child was reserved because the respondent has at all times supported the child. That during all the time the only contributions made by defendant towards the support of the child were a few minor articles of clothing. That on June 1, 1943, "plaintiff remained for the third time and moved to Mississippi, abandoning the minor child to the care and custody of the respondent," and since the marriage, plaintiff has visited the child only about 5 times and never made any contribution towards the child's support. The court further set up that about October 11, 1943, defendant filed his petition, as above stated, for the purpose of visiting the child (and also in objection to respondent's custody, care and maintenance of the child) which request of defendant was granted by the respondent. That defendant failed to visit the child except on a few occasions at such times as were detrimental to its welfare, etc. That plaintiff and defendant had

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abandoned the child since April 9, 1943, and that respondent had the care and support of the child since he was 3 months old; that it was not for the best interest of the child to give the custody of him to the father.

On the same day, October 3, the matter was heard before Judge Feinberg, and an order entered which recites the filing of the petition, the answer, etc.; that the court had heard the evidence and arguments of counsel for the respective parties and it was ordered, adjudged and decreed that the prayer of defendant's petition be denied; and that the minor child remain with his grandmother, Mrs. Weinstein, "until the further order of this court." It is from this order that defendant appeals.

The chancellor in deciding the case said that in such cases the welfare of the child was of primary and paramount importance and of course the rights of the parents and other persons should be considered. Obviously this is the law, People v. Porter, 23 Ill. App. 196; Cormack v. Marshall, 211 Ill. 519, and the court said: "It appears here clearly that this child has been with the maternal grandmother since birth, with the exception of a short period of time when the parties had their own apartment. The maternal grandmother is a widow. She has a large apartment, and apparently is a woman of means. She has had this child since birth, and had given it, concededly every care and comfort and protection that a child of these tender years would require. There is no complaint raised at all by any one here against the manner in which the child has been cared for. \*\*\*

"Nothing has been done here to disturb the custody of this child from the date of the decree was entered until the present, except in October of 1943 the Court, after a hearing, fixed specifically the hours and the days when this father could have



abandoned the child since April 9, 1905, and that respondent had the care and support of the child since he was 3 months old; that it was not for the best interest of the child to give the custody of it to the father.

On the same day, October 3, the father and mother before Judge Winbery, and an order entered which recites the filing of the petition, the answer, etc.; that the court had heard the evidence and arguments of counsel for the respective parties and it was ordered, adjudged and decreed that the prayer of the father's petition be denied; and that the minor child remain with his grandmother, Mrs. Winbery, "until the further order of this court." It is true this order that respondent appeals.

The chancellor in deciding the case said that in such cases the welfare of the child and of society and government in general and of course the rights of the parents and others were to be considered. Obviously this is the law, People v. Porter, 23 Ill. App. 1st; People v. Winbery, 211 Ill. 415, and the court said: "It appears very clearly that the child has been with the maternal grandmother since birth, and the exception of a short period of time when the parties had their own apartment. The maternal grandmother is a widow. She has a large apartment, and apparently is a woman of means. She has had this child since birth, and had given it, undoubtedly every care and comfort and protection that a child of these tender years would require. There is no complaint raised at all by any one here against the manner in which the child has been cared for."

"Nothing has been done here to disturb the custody of this child from the date of the decree was entered until the present, except in October of 1905 the court, after a hearing, found specifically the father and the day when this father could have

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the child, which is proper and leads to less confusion. He has not been denied that right. He does not complain that he has not had the benefit of that order." And the uncontradicted evidence is that he had the benefit of other visits with the child.

"Now, let us be sensible about this thing. Here is a young man who contemplates remarriage. He doesn't have any idea, and couldn't have any idea how well that marriage will result. He has made one mistake apparently, I hope he makes no more. But should he find he has made some mistake in remarriage, you would have a child in the hands of a young woman who had not even had an opportunity to adjust her life with her husband, much less to ask her to adjust her life with a young infant of that age.\*\*

"It is not fair to burden a young girl twenty-one or twenty-two years of age with a young infant of that age. It would be better for the sake of every one, and for the sake of that child, to see what kind of a home life he has after he is married. \*\*\* we shouldn't deprive that child of what he has, we shouldn't take it away from the child to satisfy the wishes of either a roaming mother or an ambitious father. \*\*\*

"The defendant is living with his mother and father. I don't know if his mother wants to have the child in her home. She has not been brought in here for the Court to see or hear her. I don't know whether his mother wants to raise this child, I would have to know from her whether she wants the child in her home. This court was not afforded an opportunity to see the paternal grandmother and paternal grandfather. They are not in here clamoring for that child. And that is where he is going to take the child. Is it fair to force the care of the child on this paternal grandmother and paternal grandfather, at their age, without their being here at least to clearly indicate their urge and desire to have the child? \*\*\* He has no other place to offer



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the child, which is proper and tends to full education. It has  
not been denied that right. He does not say that he has  
not had the benefit of that order, and the unimpaired  
degree in that he had the benefit of other visits with the child.  
"Now, let us be realistic about this thing. Does it  
young man who contributed remarkably. It doesn't say any more,  
and couldn't have any idea how well that business will develop.  
He has made one mistake apparently, I hope he never makes it.  
I should be glad to see some advice in your paper, you would  
have a child in the hands of a young woman who had not even  
had an opportunity to adjust her life with her husband, and  
I am not sure but to adjust her life with a young infant of that age."  
It is not fair to burden a young girl twenty-one or twenty-two  
years of age with a young infant of that age. It would be better  
for the sake of every one, and for the sake of that child, to  
see that first of a home life he has given to it. He is  
apparently deprived that child of what he has, he shouldn't take  
it away from her child to satisfy the wishes of other people.  
either on an arbitrary basis."  
"The defendant is living with his mother and father. I don't  
know if his mother wants to have the child in her home, and can  
not bear thought to have the child in her home now. I  
don't know whether his mother wants to have the child, I would  
have to know how far whether she would like child in her home.  
This court was not offered an opportunity to see the defendant  
separately and without suggestion, and so not in haste  
deciding for that child, and now in haste he is going to take  
the child. It is fair to know the state of the child or care  
between grandmother and mother, and grandmother, at least one,  
without their being here at least to observe. I think their rights  
and desire to have the child and he has no other place to offer

6.

that child. It is the child's welfare this Court is interested in and not the father's or the mother's.

"If and when he marries again, and he has established a home, and he can convince this Court he has a home where that child can be cared for, this Court is always open. He is never foreclosed. He may not have succeeded now, he may succeed the next time. But this Court would be derelict in its duty if it disturbed the present custody of that child under these circumstances."

We have considered all the evidence in the case and arguments of counsel<sup>and</sup> are clearly of opinion that the finding of the chancellor ought not to be disturbed. The order appealed from is not final as to the custody of the child for it is there expressly decreed that the child remain with his grandmother "until the further order of this court."

The order of the Circuit court of Cook county is affirmed.

ORDER AFFIRMED.

Niemeyer, J., and Matchett, J., concur.



that child. It is the child's welfare that must be considered

in and not the father's or the mother's.

"It and when he carries away, and he has established a

home, and he can convince this Court he has a home where that

child can be cared for, this Court is always open. He is never

foreclosed. He may not have succeeded now, he may succeed the

next time. But this Court would be derelict in its duty if it

disturbed the present custody of that child under these circum-

stances."

"We have considered all the evidence in the case and agree-

ments of counsel<sup>and</sup> are of the opinion that the finding of

the chancellor ought not to be disturbed. The order appealed

from is not final as to the custody of the child for it is there

expressly decreed that the child remain with his grandmother

"until the further order of this court."

The order of the Circuit Court of Cook County is affirmed.

ORDER AFFIRMED.

McNoy, J., and Mitchell, J., concur.

42737

FEDERAL LIFE INSURANCE COMPANY,  
a corporation,

Plaintiff (Appellant),

v.

FREDERICK L. HUNTER, JR.,

Defendant (Appellee)

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

326 I.A. 465

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action to cancel an insurance policy on the grounds of misrepresentation and failure to fully disclose material facts in the application. After trial the complaint was dismissed for want of equity and plaintiff appeals.

In July of 1930, defendant, then 35 years of age, filed a written application for the policy which issued August 4, 1930, indemnifying him against losses from disability and hospitalization. In 1931 and 1939 defendant was hospitalized and was paid the indemnities. In 1940 after a four day hospitalization period, plaintiff refused to pay defendant's claim, tendered him the premiums paid plus interest and asked him to agree to the cancellation of the policy. He refused to do so and commenced suit in the Municipal Court. Prosecution of that suit is suspended, until this cause is determined, by agreement of the parties.

One issue here is whether defendant misrepresented the condition of his health and withheld medical information in the application material to the risk. The other, if plaintiff prevails in the first, is whether it is guilty of laches.

The application is in the record as part of the insurance policy. It consists of two parts. The answers in Part I were written by "Edw. A. Condy (Soliciting Agent)" and those in Part II were written by "A. J. Rissinger, Md., Medical Examiner." Both



RENEAL LIFE INSURANCE COMPANY,  
a corporation,

Plaintiff (Appellant),

v.

WESLEY L. HUNTER, JR.,

Defendant (Appellee).

3261A-468

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

This is an action to cancel an insurance policy on the

grounds of misrepresentation and failure to fully disclose material facts in the application. After trial the court has rendered a judgment for want of equity and plaintiff's appeal.

In July of 1930, defendant, then 23 years of age, filed

a written application for the policy which issued August 4, 1930, insuring his person from disability and hospitalization.

In 1931 and 1932 defendant was hospitalized and was paid the

indemnity. In 1940 after a four day hospitalization period,

plaintiff refused to pay defendant's claim, tendered him the premium

paid plus interest and asked him to agree to the cancellation of

the policy. He refused to do so and commenced suit in the Municipal

Court. Prosecution of that suit is suspended, until this cause is

determined, by agreement of the parties.

One issue here is whether defendant misrepresented the

condition of his health and withheld medical information in the

application material to the risk. The other, if plaintiff prevails in

the first, is whether it is guilty of breach.

The application is in the record as part of the insurance

policy. It consists of two parts. The answers in Part I were

written by "Edw. A. Gony (collecting agent)" and those in Part II

were written by "A. J. Bessinger, M.D., Medical Examiner." Both

parts were signed by defendant who certified he had "read the above statements and answers and find each of them recorded as made by me and that each of the answers made by me as stated in Parts I and II of this application are full, complete and true." In Part I he agreed th t any false answer made to either Condry or ~~Rissinger~~ with intent to deceive or materially affecting either acceptance of the risk or hazard assumed by plaintiff should bar his recovery. Plaintiff says defendant falsely answered in the negative question 16 of Part I, "Have you ever had or have you now any bodily or mental infirmity or deformity (including hernia and rupture) or have you impaired hearing, any disease of either eye, lost a limb or the sight of an eye, or are you in any respect maimed or in unsound condition mentally or physically? (Give particulars)." It also says that he failed to disclose material facts by stating in Part II that he had never had pneumonia, la grippe or any other form of lung disease or any disease of the stomach or bowels or any disease of the rectum or of the spine and, by stating that he never had rheumatism, lumbago or gout or any discharge from the ear.

Plaintiff introduced hospital records made in February, 1931 which stated that defendant had had periodic disabling attacks progressively frequent and severe, of low back pain for 5 or 6 years, and leg pains 5 months before the time of the report; that he had been habitually constipated and had severe typhoid 20 years earlier; and that he complained of pain in the leg and had pains in the hip and sciatica nerve and sacroiliac tenderness. The diagnosis was lumbar myositis, sciatica and chronic constipation. It also introduced the hospital record of July 15, 1940, stating that defendant had hip pains beginning about 1924 and in 1931 sciatic pain in the legs; that there was acute sciatic attacks in 1931 and 1939, probably caused by business worries; that since 1931 he had





fatigued easily; that defendant's chief complaints were bowel trouble since he was 5 years old; arthritis-sciatica for 16 years and fatigue for 10 months; that in 1931 he had "cathartic colitis" for which the treatment prescribed produced excellent results until shortly before the date of the report; that he had influenza in 1919 and 1922 and typhoid when he was 13 years old; that he had<sup>a</sup>/hemorrhoidectomy in 1930; that his brother and father had rheumatism and arthritis, his brother an arthritic spine and his sister arthritis; that he did not appear ill; and that he gave the impression of being a hypochondriac.

The medical men who made the records testified that the writings were their summaries and interpretations of what defendant told them. A physician who examined him in August, 1932 testified to making records which were introduced. They stated that defendant had had occasional hip and back pains for five years which became progressively worse; that he had difficulty in sitting and bending in August, 1930; that he had had influenza; that he had been chronically constipated, but was now all right; that he had arthritis and that he spent a month in St. Luke's Hospital in 1931 for sciatica, which left entirely. The record contained an entry made after the history was taken of the doctor's conclusion which was "sacro-lumbar arthritis."

A medical expert testified that x-rays taken in July, 1940 showed arthritic changes in the lower back, sacroiliac and hip regions; that the deposits were "old stuff - years rather than months"; that the deposits developed differently for different people; that the changes may have been there a long time before any acute manifestation and that from the x-rays he could not tell how long defendant's arthritic changes had been in process; that with hard structures of the back there might be change with no pain or disability; and that the tendency toward arthritis might be hereditary.

Dr. Thomas the attending physician in 1931 said he treated defendant for arthritis of the lower back and sciatica; that



...that defendant's chief complaint was lower extremity  
since he was 5 years old; ... for 15 years and before  
for 15 months; that in 1951 he had "osteoarthritis" for which the  
treatment prescribed reduced painful results until nearly normal  
the date of the report; that he had influenza in 1949 and 1950 and  
typhoid then he was 15 years old; that he had ... in  
1950; that his brother and father had rheumatism and arthritis; his  
brother an arthritis spine and his sister arthritis; that he did not  
appear ill; and that he gave the impression of being a hypochondriac.  
The medical man who made the records testified that the  
... were their accounts and interpretation of what defendant  
told them. A physician who examined him in August, 1950 testified  
to having records which were introduced. They stated that defendant  
had had occasional pain and back pain for five years which became  
progressively worse; that he had difficulty in sitting and bending  
in August, 1950; that he had had influenza; that he had been chronically  
constipated, but was not ill right; that he had arthritis and that he  
was a month in St. Luke's Hospital in 1951 for colitis, which left  
entirely. The record contained an entry under 1951 for the history and  
exam of the doctor's conclusion which was "osteo-arthritis".  
A medical expert testified that x-rays taken in July, 1950  
showed arthritis changes in the lower back, sacroiliac and hip regions;  
that the deposits were "old about 5 years rather than recent"; that  
the deposits developed differently for different people; that the  
changes may have been there a long time before any acute inflammation  
and that from the x-rays he could not tell how long defendant's  
arthritis changes had been in process; that with hard exercises of  
the back there might be change with no pain or disability; and that  
a tendency toward arthritis might be hereditary.  
Dr. Thomas the attending physician in 1951 said he treated  
defendant for arthritis of the lower back and pelvis; that

defendant said the pain started about 1927; that the arthritis was not of recent origin; that the vertebral arthritis was a 15 year development; and that in 1939 defendant's arthritis was improved and the last time the witness saw him it had spent itself.

A medical referee testified that different answers to some of the questions would per se have materially affected the risk, while others would require further medical details. An insurance underwriter testified he would not approve an application with a statement that the applicant was in unsound physical condition or had disease of the stomach or bowels or the spine, or rheumatism, etc., or discharge from the ear. He said that underwriters do not consider medical examiners' reports. This seems inconsistent with the medical referee's testimony.

An employee of plaintiff testified that defendant said he had withheld certain information, but denied making certain misrepresentations.

It seems to us that when plaintiff prepared its application it should have known that persons applying for insurance would answer questions in the light favorable to their application. The question, "Are you \* \* \* in unsound condition \* \* \* physically?", calls for an applicant's opinion of his health. Either he can answer himself and, generally will do so in favor of himself, or he will not understand the question and ask for details. The details will be given by the soliciting agent whose function is to record the answers and sign Part I of the application. We may assume the agent is anxious to sell the policy.

Over objection of plaintiff, the court permitted defendant to testify to conversations, with "Soliciting Agent" Condry, when the application was made. Plaintiff insisted it was not bound by statements of Condry and that defendant was bound by his own answers. In



Defendant said the pain started about 1927; that the arthritis was not of recent origin; that the vertebral arthritis was a long year development; and that in 1929 defendant's arthritis was improved and the last time the witness saw him it had about 1932.

A medical referee testified that defendant's answers to some of the questions would not be entirely correct. He testified that while others would require further medical details, an insurance underwriter testified he would not approve an application with a statement that the applicant was in normal physical condition or had absence of the stomach or bowels or the spine, or rheumatism, etc., or discharge from the ear. He said that underwriters do not consider medical examiners' reports. This seems inconsistent with the medical referee's testimony.

An employee of plaintiff testified that defendant said he had withheld certain information, but denied making certain statements.

It seems to me that when plaintiff prepared its application it should have known that persons applying for insurance would answer questions in the light favorable to their application. The position, "are you in normal condition?" or "physically?" calls for an applicant's opinion of his health. Either he can answer himself and generally will do so in favor of himself, or he will not understand the question and ask for details. The details will be given by the collecting agent whose function is to record the answers and sign part I of the application. He may assume the agent is entitled to fill the policy.

Over objection of plaintiff, the court permitted defendant to testify to conversations with "collecting agent" Gandy, when the application was made. Plaintiff insisted it was not bound by statements of Gandy and that defendant was bound by his own answers. In

rebuttal there was testimony that Condry was not employed by plaintiff but that its agent was the "Higbee Agency". It appears from the policy that it issued through the Higbee Agency and that Condry signed as soliciting agent. He delivered the benefit checks to defendant. It is a fair inference that Condry was the Higbee employee and plaintiff's sub-agent. We think the court properly admitted the testimony.

Defendant says he asked Condry what Question 16 meant and was told that if he considered himself in good health and had worked steadily, he could answer in the negative. He says he told Condry that he lost work but once, in 1922 with influenza, and told him of the typhoid.

Defendant worked from 1922 to 1930 from 8 to 20 hours a day in electric research, standing a great deal. It is true he had chronic constipation, but it had never brought him to a doctor. Following the advice received at St. Luke's Hospital it had been corrected. He admits having had "catches" in his hip occasionally but says he had none between 1926 and 1930 and none which interfered with his work. The x-rays in the case were taken 9 years after the application was filed and the doctors do not definitely say defendant's arthritic condition must have manifested itself before 1930. The medical records of 1931/<sup>state</sup>~~indicate~~ that defendant was generally in good physical condition and the medical examiner testified that defendant was in sound health in July, 1930. We believe the trial court was justified in finding that as to this question there was no misrepresentation or withholding of information and was justified in finding that defendant's answer was not false.

It seems clear that the questions asked in Part II presupposed some discussion with the medical examiner. The average person could not for instance freely answer from his own knowledge whether he had



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...that it was the ...  
...it is a fair inference that Gandy was the ...  
...testimony.

...testimony says he asked Gandy what ...  
...was told that if he ...  
...testimony, he could ...  
...that he lost work ...  
...the ...

...testimony worked from 1921 to 1922 ...  
...in electric ...  
...testimony, but it ...  
...following the ...  
...corrected. He ...  
...says he had ...  
...the ...  
...tion was ...  
...The ...  
...medical records of 1921 ...  
...physical condition ...  
...in good health in 1921, 1922. ...  
...testimony is ...  
...information ...  
...testimony's answer was not ...

...it seems clear that the ...  
...was ...  
...at the ...

locomotor ataxia, vertigo or syncope, renal colic or jaundice, gallstones or any disease of the gall-bladder, liver or spleen. Plaintiff evidently foresaw, as it should have foreseen, that applicants, especially good risks, would need interpretations, explanations or advice in answering the questions, for it provided in the form a space for the medical examiner to sign as a witness. Defendant says he told the medical examiner, in answer to the question about disease of the stomach or bowels, of his constipation and typhoid; in answer to the question whether he had had pneumonia, la grippe or lung disease, told of the influenza; and in answer to the question whether he had had rheumatism, lumbago or gout, or disease of the spine, told of the "catches" in his hip. In answer to the question whether he had had a discharge from the ear, defendant says he told Rissinger that his parents informed him at 13 years of age that during an attack of typhoid there had been a discharge from his ear, and that he had never had a doctor's diagnosis. Rissinger said he considered defendant in good health when the application was signed; that he was told of defendant's "catches" in the back but had not put it down because defendant had not consulted a doctor and an examiner does not put down every ache or pain; that the influenza was put under fever and not under lung disease; and that as he recalled it, the defendant's statement of the ear discharge "did not amount to anything" and was possibly connected with the typhoid. He further testified that he did not recall defendant telling him of a 3 year ear discharge about 1915.

Clearly, in 1920 when defendant applied for a policy with another company, the term "otorrhea" must have been explained to him for he stated there was a 3 year discharge of the ear. It may be that <sup>the</sup> medical examiner of that company had a different view of the seriousness of an ear discharge. Defendant cannot be blamed for this diversity of view, if it is a fact. Moreover, the hospital records indicate normalcy of defendant's ears and defendant's medical experts





testified that if defendant had no reoccurrence of the ear discharge between 1915 and 1930 apprehension of ill health from that source could reasonably be precluded. Dr. Rissinger's action is understandable.

While bowel trouble, as defendant's ailment was termed in the hospital reports, may be embraced in the term "disease", we think the ordinary person's estimate of disease does not include the difficulty defendant experienced. The testimony referring to the arthritic changes, leaves ample room for the inference that none of the "catches" in the hip nor back were, in July, 1930, indications to defendant that he had "disease of the spine" or rheumatism, lumbago or gout.

It is true that defendant made the certificate of truthfulness of his statements and answers after the answers were written. According to his testimony they were true in the light of the interpretation placed thereon by the man who interpreted the questions for him and recorded his answers. The court believed defendant and we cannot say he should not have. We see nothing in defendant's medical history which indicates that he misrepresented facts or gave false answers to any question in Part II, especially in view of his testimony that he answered the questions after they were interpreted to him by the medical examiners, and in view of Rissinger's supporting testimony. The questions were for the trial court.

We need not consider the other issue raised.

We have read the principal cases cited by both parties and find nothing in them which is applicable here. We cannot say there was anything learned by defendant after the application was made which indicated to him that answers given by him were false when made. This consideration distinguishes the instant case from those cited where the applicant by retaining the policy, with knowledge, adopted false statements. Other cases have to do with false answers. What





we have said hereinabove is sufficient to distinguish them. There is no fraudulent intent indicated here as there was in the Western and Southern Life Insurance Company v. Tomasun, 358 Ill. 496. On the question of the ear discharge, if that can be considered a misrepresentation, we think the question of its materiality was for the trial court. This is sufficient to distinguish Weinstein v. Metropolitan Life Ins. Co., 60 N. E. (2d) 207 (Ill.).

Under all the circumstances, we think the trial court's judgment is right and it is hereby affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. CONCURS.

LEWE, J. TOOK NO PART.



we have said heretofore is sufficient to establish that, there

is no fraudulent intent imputed to the party in the

Leavenworth and Southern Life Insurance Company v. Leavenworth, 202 Ill. 497.

On the question of the law applicable, it may be said that a

misrepresentation, we think the question of its materiality was for

the trial court. This is sufficient to distinguish Leavenworth v.

Leavenworth Life Insurance Co., 90 Ill. 2d (111).

Under all the circumstances, we think the trial court's

judgment is right and it is hereby affirmed.

JUSTICE AFFIRMED.

WYATT, J. J. CONCURS.

LEWIS, J. DICKSON, JR. CONCURS.

42995

LEON BROWNSTEIN, a minor, by ANNA  
BROWNSTEIN, his mother and next  
friend,

Appellant,

v.

ELECTRIC HOUSEHOLD UTILITIES  
CORPORATION, a corporation, and  
HURLEY MACHINE COMPANY, a corporation,  
impleaded with TROY SUNNYSIDE BUILDING  
INC., a corporation,

Appellees.

110  
APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

326 I.A. 466

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

By this appeal, Leon Brownstein, a minor, seeks to reverse a judgment in favor of the defendants Electric Household Utilities Corporation, a corporation, and Hurley Machine Company, a corporation, impleaded with Troy Sunnyside Building, Inc., a corporation, entered on the verdict of a jury which found for defendants in a suit for personal injuries resulting from the alleged negligent maintenance of an electrically operated washing machine. Plaintiff's motion for a new trial was overruled.

The evidence discloses that at the time of the accident, June 3, 1942, the plaintiff was about 4½ years of age and had been residing with his parents during the preceding year in the premises located at 4452 Troy Street in the City of Chicago, known as the Troy Sunnyside Building. This building, consisting of 21 apartments, was owned and operated by the defendant Troy Sunnyside Building, Inc., a corporation. It had four laundries located in the basement thereof, the use of which was assigned to certain tenants occupying the building. The laundry used by the Brownstein family was about 75 feet long, 11 feet wide and 9½ feet high and contained four wash tubs, lockers, and a movable coin-operated electric washing



LEON BRONSTEIN, a minor, by LARA BRONSTEIN, his mother and next friend,

Appellant,

v.

ELECTRIC HOUSEHOLD UTILITIES CORPORATION, a corporation, and HURLEY MACHINE COMPANY, a corporation, implied with TROY SUNNYSIDE BUILDING, INC., a corporation,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY,

3261A.466

MR. JUSTICE LEWIS AND THE OPINION OF THE COURT.

By this appeal, Leon BroNSTEIN, a minor, seeks to reverse a judgment in favor of the defendants Electric Household Utilities Corporation, a corporation, and Hurley Machine Company, a corporation, implied with Troy Sunnyside Building, Inc., a corporation, entered on the verdict of a jury which found for defendants in a suit for personal injuries resulting from the alleged negligent maintenance of an electrically operated washing machine. Plaintiff's motion for a new trial was overruled.

The evidence discloses that at the time of the accident, June 3, 1942, the plaintiff was about 4 1/2 years of age and had been residing with his parents during the preceding year in the premises located at 4452 Troy Street in the City of Chicago, known as the Troy Sunnyside Building. This building, consisting of 21 apartments, was owned and operated by the defendant Troy Sunnyside Building, Inc., a corporation. It had four laundries located in the basement thereof, the use of which was assigned to certain tenants occupying the building. The laundry used by the BroNSTEIN family was about 75 feet long, 11 feet wide and 9 feet high and contained four wash tubs, lockers, and a movable coin-operated electric washing

machine. Entrance to the laundry room was gained through a door which according to the testimony of defendants' witnesses was equipped with a Corbin lock attached on the inside. The lock was located about  $3\frac{1}{2}$  feet above the bottom of the door, and locked automatically whenever the door was closed. To unlock it a key furnished by the landlord to each tenant was used.

The washing machine in question was placed in the laundry room by the defendants for the convenience of the tenants under a written contract between the Troy Sunnyside Building, Inc. and the other defendants, which provided that the Troy Sunnyside Building, Inc. was to receive 15 per cent of the proceeds and the operating condition of the machine was to be maintained by the other defendants. By placing a ten-cent coin in a receptacle attached to the machine and turning a knob the machine could be set in motion for approximately 30 minutes. If the operator of the washing machine turned it off before using it for the entire period, such unexpended energy could be utilized by again turning the knob.

The gist of the amended complaint was that the defendant Troy Sunnyside Building, Inc., was in possession, control and management of the building and the defendants Electric Household Utilities Corporation and Hurley Machine Company were engaged in the business of selling and leasing for hire and reward electric power-driven washing machines; that many of the families of the tenants had children of tender years who played in the basement of the building in the immediate proximity of the washing machine with the knowledge and consent of the defendants; that insertion of the requisite coin would release sufficient energy to keep the machine in motion for 30 minutes and that if the machine was not kept in motion for that period the residue of such unexpended energy would enable anyone to put the machine in motion by using



machines. Entrance to the laundry room was gained through a door which according to the testimony of defendant, witnesses were equipped with a Corbin lock attached on the inside. The lock was located about 3 1/2 feet above the bottom of the door, and locked automatically whenever the door was closed. To unlock it a key furnished by the landlord to each tenant was used.

The washing machine in question was placed in the laundry room by the defendant for the convenience of the tenants under a written contract between the Troy Laundry Building, Inc. and the other defendants, which provided that the Troy Laundry Building, Inc. was to receive 10 per cent of the proceeds and the operating condition of the machine was to be maintained by the other defendants. By placing a ten-cent coin in a receptacle attached to the machine and turning a knob the machine could be set in motion for approximately 30 minutes. If the operator of the washing machine turned it off before using it for the entire period, such unexpended energy could be utilized by again turning the knob.

The gist of the amended complaint was that the defendant Troy Laundry Building, Inc., was in possession, control and management of the building and the defendant Electric Household Utilties Corporation and Hurley Machine Company were engaged in the business of selling and leasing for hire and reselling electric power-driven washing machines; that many of the families of the tenants had children of tender years who played in the basement of the building in the immediate vicinity of the washing machine with the knowledge and consent of the defendant; that insertion of the requisite coin would release sufficient energy to keep the machine in motion for 30 minutes and that if the machine was not set in motion for that period the residue of such unexpended energy would enable anyone to put the machine in motion by using

the starting and stopping device on the machine, which was easily accessible to children of tender years who might be then playing about the premises. The amended complaint further alleged that the defendants negligently and carelessly neglected to provide some sort of safeguard to prevent children of tender years from starting the washing machine; and that the defendants allowed and permitted children of tender years to play in close proximity to said washing machine.

The defendants filed answers denying substantially all of the charges of negligence in the amended complaint. Afterwards the defendant Troy Sunnyside Building, Inc. filed an amendment to its answer averring that "plaintiff was a licensee or trespasser on that part of the premises where the accident is alleged to have taken place, and that the only duty it owed him was not to wilfully and wantonly injure him."

Plaintiff Leon Brownstein's testimony shows that about 2 o'clock p.m. on June 3, 1942 he entered the laundry room in question to get a drink of water from a faucet in a wash tub immediately adjacent to the electric washer and that as he went by the electric washing machine he "kicked it" and it started in motion, and that while it was in motion his right hand was caught in the rollers of the wringer, causing the injuries complained of; that he entered the laundry room alone and that he never saw boys play there before; that this was the first time he entered the laundry room in question. The undisputed evidence is that Bertha Gold, a tenant, entered the laundry room by the use of a key furnished by the landlord, at about 10 o'clock in the morning on June 3, 1942, and used the washing machine in question for about an hour. She testified that, as she left, "I closed the door. It had a patent lock on it." A careful examination of the record fails to disclose how the plaintiff gained admission to the laundry room. The



the starting and stopping device on the machine, which was easily accessible to children of tender years who might be then playing about the premises. The amended complaint further alleged that the defendants negligently and carelessly neglected to provide some sort of safeguard to prevent children of tender years from starting the washing machine; and that the defendants allowed and permitted children of tender years to play in close proximity to said washing machines.

The defendants filed answers denying substantially all of the charges of negligence in the amended complaint. Affirmative the defendant Troy Garvey & Sons, Inc. filed an amendment to its answer averring that "plaintiff was a licensee or trespasser on that part of the premises where the accident is alleged to have taken place, and that the only duty it owed him was not to willfully and wantonly injure him."

Plaintiff Leon Brownstein's testimony shows that about 2 o'clock p.m. on June 3, 1944 he entered the laundry room in question to get a drink of water from a faucet in a wash tub immediately adjacent to the electric washer and that as he went by the electric washing machine he "kicked it" and it started in motion and that while it was in motion his right hand was caught in the rollers of the wringer, causing the injuries complained of; that he entered the laundry room alone and that he never saw boys play there before; that this was the first time he entered the laundry room in question. The undisputed evidence is that Bertha Gold, a tenant, entered the laundry room by the use of a key furnished by the landlord, at about 10 o'clock in the morning on June 3, 1944, and used the washing machine in question for about an hour. She testified that, as she left, "I closed the door. It had a patent lock on it." A careful examination of the record fails to disclose how the plaintiff gained admission to the laundry room. The

testimony of the witnesses is in hopeless conflict, but despite the conflicting evidence we think there was sufficient evidence to justify a jury in finding (1) that the Corbin lock was placed on the door of the laundry room several years before the Brownstein family became tenants; (2) that keys were furnished each tenant, including the Brownstein family, for the use of the laundry room; (3) that children of the tenants did not use the laundry room as a play room; and (4) that the electric washing machine was inspected two days before and on the day following the accident June 3, 1942, and found to be functioning properly.

Plaintiff's theory is that plaintiff and other children were constantly playing in the laundry room near the washing machine, which could be started by a jar if there was any available electric power unexpended after the insertion of a coin; that it was the duty of defendants to guard the children from danger of injuries that might result therefrom, which they negligently failed to do.

Defendants' theory is that plaintiff was in the laundry room without the express or implied permission of the defendants.

Plaintiff's principal contention is that the court erred in giving Instruction number 1, which reads as follows:

"1. The court instructs the jury that if you believe, from the evidence, that the plaintiff was in the laundry room of the defendant, Troy Sunnyside Building, Inc., where he was injured, without the express or implied permission of the said defendant, he was a trespasser, and the duty owed to a trespasser by an owner of property is simply to refrain from wantonly and wilfully injuring him."

In their brief, plaintiff's counsel allege that the phrase "without the express or implied permission of said defendant" which appears in the instruction does not state the law correctly. In support of this position, plaintiff stresses the case of Gritton v. Illinois Traction, Inc., 247 Ill. App. 395, where it appears that for a period of two years children residing in the vicinity used an electric switch track, which had overgrown with vegetation,



testimony of the witnesses is in complete conflict, but despite the conflicting evidence we think there was sufficient evidence to justify a jury in finding (1) that the Gordon foot was placed on the floor of the laundry room several years before the Brownstein family became tenants; (2) that keys were furnished each tenant, including the Brownstein family, for the use of the laundry room; (3) that children of the tenants did not use the laundry room as a play room; and (4) that the electric washing machine was installed two days before and on the day following the accident June 8, 1943, and found to be functioning properly.

Plaintiff's theory is that plaintiff and other children were constantly playing in the laundry room near the washing machine, which could be started by a key if there was any available electric power unswitched after the insertion of a coin; that it was the duty of defendant to guard the children from danger of injuries that might result therefrom, which they negligently failed to do. Defendant's theory is that plaintiff was in the laundry room without the express or implied permission of the defendant. Plaintiff's principal contention is that the court erred in giving instruction number 1, which reads as follows:

"1. The court instructs the jury that if you believe from the evidence, that the plaintiff was in the laundry room of the defendant, 'Boy Laundry Building, Inc.,' where he was injured, without the express or implied permission of the said defendant, he was a trespasser, and the duty owed to a trespasser by an owner of property is simply to refrain from wantonly and maliciously injuring him."

In their brief, plaintiff's counsel allege that the phrase "without the express or implied permission of said defendant" which appears in the instruction does not state the law correctly. In support of this position, plaintiff stresses the case of Wittion v. Illinois Traction, Inc., 245 Ill. App. 2d, where it appears that for a period of two years children remained in the vicinity used an electric switch track, which had overgrown with vegetation,

as a playground. The plaintiff, a minor nine years of age, was burned by a broken trolley feed wire which dangled from a pole about a foot above the ground. At page 401, the court said:

"If an owner maintains dangerous conditions upon his premises to which he permits children to come he must use ordinary care to guard them against danger which their youth and ignorance prevent them from appreciating. There is no implied invitation from the mere existence of a dangerous attraction which is not discoverable off the premises, but if to the knowledge of the owner children habitually come upon his premises where a dangerous condition exists to which they are exposed, the duty to exercise care for their safety arises, not because of an implied invitation but because of his knowledge of unconscious exposure to danger which the children do not realize."

On the oral argument, counsel for plaintiff cited the recent case of Powell v. Weiner, 325 Ill. App. 297 (Abst.), contending that the question determined therein is no nearly analogous to the one presented in the instant case that it should be controlling. An examination of that opinion discloses that children of tender age had access to the laundry room at all times; that the door had no lock, nor were keys furnished to the tenants using the laundry room, as in the instant case.

We have analyzed the cases cited by the plaintiff and are of the opinion that they have no application to the factual situation in the case at bar.

Defendants were entitled to an instruction based on their theory. (Thomas v. Chicago Embossing Co., 307 Ill. 134, 140-141.) In support of their position, defendants stress the cases of Cunningham v. Toledo St. L. & W. R. R. Co., 260 Ill. 589; Prickett v. Pardridge, 189 Ill. App. 307; and Darsch v. Brown, 332 Ill. 593. In the Darsch case the court said, at page 596:

"Under our decisions, which are most liberal to children, if the conditions are such that the owner may reasonably anticipate that children of such tender age as to be incapable of exercising proper care for their own safety may by their own instincts be attracted to the dangerous thing and thereby exposed to danger, he will be liable for an injury to a child so attracted, resulting from leaving the machine or dangerous thing exposed." (Citing City of Pekin v. McMahon, 154 Ill. 141, and Ramsay v. Tuthill Material Co., 295 Ill. 395.)



as a playground. The plaintiff, a minor nine years of age, was

injured by a broken trolley wire which snapped from a pole

about a foot above the ground. At page 401, the court said:

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which he permits children to come to some use ordinary care to  
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them from appreciating. There is no implied invitation from the  
owner to exist on his premises which is not discoverable  
by the exercise of the knowledge of the owner of the premises,  
but it is the knowledge of the owner of the premises which  
habitually come upon his premises where a dangerous condition  
exists to which they are exposed, the duty to exercise care for  
their safety arises, not because of an implied invitation but  
because of his knowledge of dangerous conditions to which  
the children do not realize."

On the oral argument, counsel for plaintiff cited the

recent case of Lavelle v. Linton, 125 Ill. App. 227 (1927).

containing that the question determined therein is no nearly analogous  
to the one presented in the instant case that it should be controlling.

An examination of that opinion discloses that children of tender  
age had access to the laundry room at all times; that the door had  
no lock, nor were keys furnished to the tenants using the laundry  
room, as in the instant case.

We have analyzed the cases cited by the plaintiff and are  
of the opinion that they have no application to the factual situation  
in the case at bar.

Defendants were entitled to an instruction based on their  
theory. (Thomas v. Chicago Telephone Co., 307 Ill. 124, 140-141.)  
In support of their position, defendants stress the cases of  
Gunnison v. Toledo St. L. & N. R. Co., 280 Ill. 523; Epstein v.  
Corbridge, 129 Ill. App. 307; and Larson v. Brown, 328 Ill. 523.

In the Larson case the court said, at page 525:

"Under our decisions, which are most liberal to children, if the  
conditions are such that the owner may reasonably anticipate that  
children of such tender age as to be incapable of exercising proper  
care for their own safety may by their own conduct be attracted  
to the dangerous thing and thereby exposed to harm, he will be  
liable for an injury to a child so attracted, resulting from leaving  
the machine or dangerous thing exposed." (Gitting City of Linton v.  
Linton, 124 Ill. App. 141, and Larson v. Brown, 328 Ill. 523.)

In the instant case, if we accept the testimony of the defendants' witnesses as being true, which the jury manifestly did, it seems to us that the defendants exercised every precaution reasonably necessary to protect the plaintiff and other children of his age from acts which the defendants might reasonably anticipate. Defendants' evidence clearly shows that the laundry room in question was not intended by the defendant Troy Sunnyside Building, Inc. for use as a play room for the children of the tenants occupying the premises, and that they did not so use it. The defendant landlord was entitled to such reasonable use of its premises as would be beneficial to it without liability to bare licensees. We think the defendants in the case at bar provided all the protection reasonably necessary under the circumstances to guard the plaintiff against injury, consistent with the reasonable use and operation of the building.

In Siddall v. Jansen, 168 Ill. 43, it appears that the father of the plaintiff was an employee of defendant, and the plaintiff five years of age was playing around defendant's store. In the absence of the father, the plaintiff wandered to an elevator shaft and was severely injured by the descending cage. There the court said, at page 46:

"An ascending and descending cage of an elevator might be said to be of such character, and to hold out an implied invitation to a five year old child."

And again, at page 47:

"Whether or not plaintiff was a trespasser was also a question of fact for the jury where there was evidence tending to show he was not."

The jury accepted the defendants' version of the accident, which was amply justified by the testimony. In applying the principles of the cases hereinabove cited to the facts of this case, we do not think that plaintiff's objection to defendants' instruction number 1 is tenable.

For the reasons indicated, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

KILEY, P.J. AND BURKE, J. CONCUR.



In the instant case, if we accept the testimony of the defendant, witnesses as being true, then the jury naturally did, it seems to us that the defendant's explanation of the accident

is reasonably necessary to protect the plaintiff and other children of his age from acts which the defendant might reasonably anticipate.

Defendant's evidence clearly shows that the laundry room in question was not intended by the defendant to be a playroom for the children of the tenants occupying the premises, and that they did not so use it. The defendant

landlord was entitled to such reasonable use of its premises as would be beneficial to it without liability to care licensees. We think the defendant in the case at bar provided all the protection reasonably necessary under the circumstances to guard the plaintiff against injury, consistent with the reasonable use and operation of the building.

In Widely v. Jansen, 128 Ill. 45, it appears that the

father of the plaintiff was an employee of defendant, and the plaintiff five years of age was playing around defendant's store. In the absence of the father, the plaintiff wandered to an elevator shaft and was severely injured by the descending cage. There the

court said, at page 46:

"An ascending and descending cage of an elevator might be said to be of such character, and to hold out an implied invitation to a five year old child."

And again, at page 47:

"Whether or not plaintiff was a trespasser was also a question of fact for the jury where there was evidence tending to show he was not."

The jury accepted the defendant's version of the accident,

which was amply justified by the testimony. In applying the principles of the case hereinabove cited to the facts of this case, we do not think that plaintiff's objection to defendant's instruction number

1 is tenable.

For the reasons indicated, the judgment of the circuit

court is affirmed.

JUDGMENT AFFIRMED.

KILPAT, P. J. AND BURKE, J. CONCUR.

43208 and 43251

326 I.A. 167<sup>1</sup>

CHARLES B. ROWE,

Appellant,

v.

VROOMAN CARPET CO., INC.,  
a corporation, et al.,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

VROOMAN CARPET CO., INC.,

Appellee,

v.

CHARLES B. ROWE and  
THEODORE A. KOLB,

Defendants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

ON APPEAL OF THEODORE A. KOLB,

Appellant.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

Pursuant to a motion made in this court and allowed,  
these cases were consolidated.

August 9, 1943 the Vrooman Carpet Company sued plaintiff herein and Mrs. Rowe upon an open account before a justice of the peace in Berwyn, Illinois. On return day, August 20, the cause was set for hearing August 27th. The defendant failed to appear and judgment was entered against him for \$215 and costs. Execution issued December 16, 1943 and Constable Braisie seized property in plaintiff's home.

43208

In this cause plaintiff on February 7, 1944 sued for a writ of certiorari to review the judgment of the justice of the peace, for an injunction, the return of property seized, for damages and for other relief. February 8 the writ of certiorari issued and February 9 an order was entered restraining the constable from disposing of the property seized.



8201A-87

45208 and 45211

CHARLES E. HOWE,

Appellant,

v.

FRANKMAN GARMENT CO., INC.,  
a corporation, et al.,

Appellees.

FRANKMAN GARMENT CO., INC.,

Appellee,

v.

CHARLES E. HOWE and  
THEODORE A. FORD,

Defendants.

ON APPEAL OF THEODORE A. FORD,

Appellant,

vs. JESSIE KILLY DELIVERED THE OPINION OF THE COURT.

Pursuant to a motion made in this court and allowed,

these cases were consolidated.

August 9, 1943 the Foreman Robert Dossany was plaintiff?

Kevin and Mrs. Howe upon an open account before a Justice of the

peace in Berwyn, Illinois. On return day, August 20, the cause was

set for hearing August 27th. The defendant failed to appear and judgment

was entered against him for \$215 and costs. Execution issued December 12,

1943 and Constable Bralide seized property in plaintiff's home.

45208

In this cause plaintiff on February 7, 1944 sued for a

writ of certiorari to review the judgment of the Justice of the

peace for an injunction, the return of property seized, for

damages and for other relief. February 9 the writ of certiorari

issued and February 9 an order was entered restraining the

constable from disposing of the property seized.

February 21 the defendants filed their appearance and March 3 an order was entered finding that the writ having issued and the equitable relief prayed for having been granted, the cause should be transferred to the Executive Committee for reassignment to a law judge. March 6 defendants made a motion to dismiss the cause on the ground that the complaint improperly joined the application for the certiorari to the other relief prayed. The same day defendant moved to quash the writ. May 5 an order was entered quashing and dismissing the writ and denying leave to file an "amended petition" for a writ of certiorari. May 25 plaintiff moved to vacate the order of May 5 and on May 31st moved for leave to amend the complaint so that the cause proceed "as a case in equity," and praying that the execution and enforcement of the justice court judgment be enjoined and that if the amendment be rejected that the cause proceed on the matters, other than the certiorari, contained in the original complaint. May 31 the court entered an order finding that the motion to vacate was filed without leave of court and denied the motion and rejected the amendment. Plaintiff has appealed from the order of May 5 quashing the writ and dismissing the "petition" for certiorari and denying leave to amend the petition, and from the order of May 31.

While the record shows a motion to dismiss the cause was filed by defendants, it does not appear that the motion was ruled upon. That matter, therefore, is not before us.

In order for plaintiff to prevail in the certiorari proceeding, it was necessary that the petition disclose, among other things, that the judgment, subject of the proceeding, was not the result of plaintiff's negligence. Chap. 79, Par. 187, Sec. 76 Ill. Rev. Stats. 1943; Couch v. Illinois Central R. R. Co., 231 Ill. App. 429; Chicago Stamping Company v. Danley, 85 Ill. App. 322; and Schmitt v. Hines Lumber Co., 124 Ill. App. 319. Apparently,



[illegible]

section 76 was not repealed by the Act of June 26, 1895 relating to justices of the peace. Budd v. Wagner, 255 Ill. App. 523; Tongeln v. Knoll, 227 Ill. App. 317; Clark v. City of Chicago, 233 Ill. 113.

It is plain from the petition that neither plaintiff nor his lawyer, who was employed after judgment was entered, was prudent in his conduct in attempting to protect plaintiff. Plaintiff absented himself from the court on the date of the judgment though he knew the case was set for that day, and neither he nor his attorney consulted the records of the court after they were informed of the entry of the judgment. They relied upon oral promises of Vrooman that the action would be discontinued, case continued and the judgment vacated. Similar conduct has been held to fall short of the requirements for certiorari. Schmitt v. Hines Lumber Co., 124 Ill. App. 319. There was nothing in the rejected amendment which tended to supply the deficiencies in the allegations, basis of the certiorari proceeding. We believe the order quashing the writ and dismissing the certiorari proceedings and denying leave to amend the "petition" for certiorari was correct.

The record does not show that the court gave leave to the plaintiff prior to his filing of the motion to vacate, nor that he sought leave at the time the order was entered. It is true that the order quashing the writ, etc., did not dispose of all the matters alleged in his complaint, but there was no reason shown by the motion to vacate, why it should be allowed. We have said the motion to dismiss is not before us. Under the circumstances in this case, however, we believe we should point out that the Civil Practice Act did not envision the complex complaint filed in this cause by plaintiff.

For the reasons given the order is affirmed.

ORDER AFFIRMED.

BURKE, P.J. CONCURS;  
Lewe, J. took no part.



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Journal of Management Education 34(10)

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U.S. DEPARTMENT OF AGRICULTURE

Upon his appeal from the judgment before the justice of the peace, plaintiff filed a bond with Theodore A. Kolb, as surety. They bound themselves to the Vrooman Company in the sum of \$500 with the condition that if plaintiff prosecuted the certiorari with effect and paid whatever judgment was rendered against him by the Circuit Court, or in case the appeal was dismissed, pay the judgment against him in the action before the justice of the peace, the obligation to be void. Following the entry of the order quashing the writ, etc., in the Circuit Court, the Vrooman Company commenced suit against plaintiff and Kolb upon the bond. Kolb defended on the ground of the appeal in the Circuit Court case. Judgment was for Vrooman Company in the sum of \$208. Kolb has appealed. He says the question is whether the appeal in Case No. 43208 "without bond" is a final judgment pending appeal.

The Circuit Court dismissed the appeal from the justice of the peace court and there was no stay of the order during the pendency of the appeal to this court. The justice of the peace judgment not being paid, the obligation was in force. The pendency of the appeal in the Circuit Court case was the only defense offered by Kolb in the Municipal Court. The judgment against him is hereby affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., CONCURS;  
LEWE, J. TOOK NO PART.



From the report from the Treasury dated the 10th of  
the month, it is stated that the Treasury is in a position  
to issue bonds in the amount of \$100,000,000 in the  
month of May. It is also stated that the Treasury is in a  
position to issue bonds in the amount of \$100,000,000 in the  
month of June. It is also stated that the Treasury is in a  
position to issue bonds in the amount of \$100,000,000 in the  
month of July. It is also stated that the Treasury is in a  
position to issue bonds in the amount of \$100,000,000 in the  
month of August. It is also stated that the Treasury is in a  
position to issue bonds in the amount of \$100,000,000 in the  
month of September. It is also stated that the Treasury is in a  
position to issue bonds in the amount of \$100,000,000 in the  
month of October. It is also stated that the Treasury is in a  
position to issue bonds in the amount of \$100,000,000 in the  
month of November. It is also stated that the Treasury is in a  
position to issue bonds in the amount of \$100,000,000 in the  
month of December.

The Treasury is in a position to issue bonds in the  
amount of \$100,000,000 in the month of May. It is also  
stated that the Treasury is in a position to issue bonds in  
the amount of \$100,000,000 in the month of June. It is also  
stated that the Treasury is in a position to issue bonds in  
the amount of \$100,000,000 in the month of July. It is also  
stated that the Treasury is in a position to issue bonds in  
the amount of \$100,000,000 in the month of August. It is also  
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the amount of \$100,000,000 in the month of September. It is  
also stated that the Treasury is in a position to issue bonds  
in the amount of \$100,000,000 in the month of October. It is  
also stated that the Treasury is in a position to issue bonds  
in the amount of \$100,000,000 in the month of November. It is  
also stated that the Treasury is in a position to issue bonds  
in the amount of \$100,000,000 in the month of December.

W. J. P. [Signature]  
1952

43221

EDITH A. BROWN,  
Appellant,

v.

WILLIAM A. BROWN,  
Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

326 I.A. 167

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a separate maintenance proceeding in which the trial court dismissed the complaint for want of equity. Plaintiff has appealed.

The parties were married in 1920 and lived in Stuart, Nebr. for 5 years on a farm. Their child Constance was born there in 1923. In 1925 they came to Chicago where defendant worked in the U. S. Postal Department until 1942. In March 1942 he came into the inheritance of his father's estate of 320 acres of land in Stuart, Nebr. In April 1942 he left Chicago and took possession of the farm. Plaintiff and Constance remained in Chicago.

Plaintiff filed her action in October 1942 charging that defendant deserted her without cause. Defendant answered that he left Chicago upon advice of his physician and that plaintiff refused to accompany him to Nebraska, although he had often requested her to do so. In his answer he invited her to resume her life with him as his wife.

The question is whether defendant deserted plaintiff. The parties agree that her residence followed his. We believe that unless he prevented her from following him in some way, that she was bound to go to Nebraska.

Plaintiff and defendant both worked in Chicago and were happy together. They treated each other well. Constance attended DePaul University and studied music. In 1941 and 1942 defendant began to lose weight and says that he was advised by



72-10383

1. The first thing I noticed when I stepped out of the plane was the cold. It was a sharp contrast to the warm, humid air of the tropics. I had heard that the weather in the north was harsh, but I didn't realize just how cold it would be. The wind was biting, and the sun felt like a distant star.

[illegible]

1. The first of these is the fact that the majority of the population of the United States is of European descent. This is a fact which has been recognized by the Government for many years. It is a fact which has been recognized by the Government for many years. It is a fact which has been recognized by the Government for many years.

The first of the several different districts.  
The district of the first residence followed by the second.  
The district of the third residence followed by the fourth.  
The district of the fifth residence followed by the sixth.  
The district of the seventh residence followed by the eighth.  
The district of the ninth residence followed by the tenth.  
The district of the eleventh residence followed by the twelfth.  
The district of the thirteenth residence followed by the fourteenth.  
The district of the fifteenth residence followed by the sixteenth.  
The district of the seventeenth residence followed by the eighteenth.  
The district of the nineteenth residence followed by the twentieth.  
The district of the twenty-first residence followed by the twenty-second.  
The district of the twenty-third residence followed by the twenty-fourth.  
The district of the twenty-fifth residence followed by the twenty-sixth.  
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The district of the thirty-fifth residence followed by the thirty-sixth.  
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The district of the forty-fifth residence followed by the forty-sixth.  
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The district of the fifty-fifth residence followed by the fifty-sixth.  
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The district of the seventy-fifth residence followed by the seventy-sixth.  
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The district of the eighty-seventh residence followed by the eighty-eighth.  
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The district of the ninety-third residence followed by the ninety-fourth.  
The district of the ninety-fifth residence followed by the ninety-sixth.  
The district of the ninety-seventh residence followed by the ninety-eighth.  
The district of the ninety-ninth residence followed by the one hundredth.

defendant began to lose weight and says that he was advised by attending Dental University and working nights. In fall and 1944 were happy together. They treated each other well. Defendant

his physician to leave Chicago. Plaintiff denies the doctor gave that advice, but admits defendant lost weight. Defendant signed a year's lease for a Chicago apartment in March of 1942, but says he expected plaintiff and Constance to follow him in June when Constance was out of school. Plaintiff says that although they discussed living in Nebraska, nothing definite was decided. Constance says that her father wrote her but never asked that she and her mother go to Nebraska. A mutual friend of the parties testified that defendant did not plan to take his family with him.

Defendant says that he asked his wife to accompany him, but that she wanted to stay in Chicago so that Constance could go to school here and continue her music. Plaintiff admits she discussed with defendant the relative merits of De Paul and Nebraska Universities. She testified that she did not want Constance to go through what plaintiff had gone through on the farm. Plaintiff wrote defendant's sister in Nebraska early in the Spring of 1942, asking her to dissuade defendant from leaving Chicago. Plaintiff says that defendant would not let her stay when she went to Nebraska in July of 1942 and told her that the farm was no place for her. Defendant's sister says she heard plaintiff tell defendant when he asked her to stay, that her duty was to her daughter and that she would not live on the farm. Constance referred to the house on the farm as a "monstrosity".

Plaintiff had the burden of proving that defendant deserted her without her fault. The testimony introduced to prove the elements necessary for plaintiff's case was controverted. We believe we have pointed out sufficient to show that we would not be justified in upsetting the decree of the trial court. The court was justified in concluding that plaintiff



his position as a lawyer. Plaintiff desires the defense  
give him advice, but the defendant has refused. Defendant  
almost a year's time for a Chicago apartment in March of 1942,  
but says he expected plaintiff and defendant to follow him in  
June and 1942 was one of several. Plaintiff says that  
although they discussed living in Chicago, nothing definite  
was decided. Defendant says that he in fact wrote her but  
never asked that she and her mother go to Chicago. A letter  
written at the time of the trial testified that defendant did not plan to  
take his family with him.

Defendant says that he took his wife to Chicago  
himself and that he wanted to stay in Chicago on that occasion  
could be in some way with his mother and sister. Plaintiff  
admits she discussed it with defendant and relative matter of  
the trial and defendant's testimony. He testified that she did  
not want defendant to go because what plaintiff had done  
himself on the 10th. Plaintiff's three children's sister in  
Chicago only in the spring of 1942, saying her to discuss  
testimony from January Chicago. Plaintiff says that defendant  
would not let her stay with the mother in April of  
1942 and told her that the time was no place for her. Defen-  
dant's sister says she heard plaintiff tell defendant when he  
asked her to stay, that was not for her daughter and that  
she would not live on the 10th. Defendant referred to the  
times on the 10th as a "rescue job".

Plaintiff had no intention of moving with defendant  
assisted her about her family. The testimony introduced to  
prove the elements necessary for plaintiff's case was contro-  
verted. It is believed to have pointed out sufficient to show that  
he would not be justified in making the move of the trial  
court. The court was justified in concluding that plaintiff

3.

had not proved that she wanted to accompany or follow her husband in fulfillment of her obligation and that he repelled her.

For the reasons given the decree of the Superior Court is affirmed.

DECREE AFFIRMED.

BURKE, P.J. CONCURS;  
LEWE, J. TOOK NO PART.



and not having been able to ascertain the  
nature of the complaint of the patient as to the  
condition of the patient.  
The case is a very serious one and the  
patient is in a very bad condition.

DEPT. OF HEALTH.

RECEIVED, 1.11.1911.  
RECEIVED, 1.11.1911.

## A

~~245~~

Agenda No. 8.

326 I.A. 511

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Lillie Patterson was the mother of this child, Hollistine.

We deem it necessary to set forth some of the salient points in evidence in this case.

Mrs. Lillie Feazel, later Lillie Patterson, had three





small children by a former husband, name Bernadette Feazel, Wallace Feazel and Bernard Feazel. About fourteen years ago, they lived with their mother in the same house. Appellant then began living at this house with the children and their mother, either as a roomer, as he claims; or illegally with Lillie Feazel, as husband and wife, as Appellee claims.

Bernadette Feazel, 21 years old at the date of the trial testified:- That her mother and appellant there lived together and acted like anybody else; that they acted all right; that they all ate at the same table; that Ab furnished the groceries; that appellant and her mother slept together in the same bed-room in the same bed all the time they lived together; and that she and the other children slept in another bed-room. Wallace Feazel, 20 years of age at the date of the trial, testified:- That his mother and appellant lived together in Harrisburg a long time; that he lived together with them; that Ab bought the groceries when they were living together; that they all ate at the same table; that appellant used to send him to the store to buy groceries and direct them to charge them to appellant, and that his mother had likewise so directed him; and that appellant and his mother slept together of nights.

Appellee testified that she was the mother of Lillie Patterson, grandmother of Hollistine, and that she had supported Hollistine from a short time prior to the death of her daughter, Lillie Patterson. She stated that Lillie Feazel and appellant lived together with Mrs. Feazel's children; that appellant lived with her daughter, Lillie, as husband and wife, starting about 14 years ago when they started living together, and when they first went to housekeeping; that they had visited at her house often and that she was at their house almost daily. She testified in regard to a conversation between appellant and herself shortly before the date of the birth of Hollistine in which she asked appellant under what name he would bury her if she should die, and where she said





they might die in such case. She stated, "so they went and got married". She testified that appellant and her daughter had always acted to her like they were married.

Hollistine was born July 4, 1932. Her mother, Lillie, died November 19, 1942. The above mentioned conversation recited by appellee was denied by appellant.

Pearl Allen testified:- That she had visited at the house where appellant and Lillie lived, a lot of times, because they were good friends; that appellant, Lillie and Lillie's children all lived together; that appellant and Lillie always treated each other very nice; that she was in and out almost every day; that they so lived together two years or better; that she had never seen Lillie and appellant in bed together; that she had seen appellant bringing in sacks of groceries and that they all ate together; that appellant and Lillie had another child which had died and she knew the other child was the child of appellant and Lillie because she had their word for it, and that appellant told her it was his baby; that she was there when the other child had died and that Lillie had said it was awful that the baby was dead and they were not even married, and that appellant said it was his baby and he paid its funeral expenses. She testified that both appellant and Lillie Feazel told her that they were going to get married as soon as they could; didn't want his people to know it. She stated that in some recent proceedings in the County Court was the first time she had heard appelland say that he and Lillie were not married.

Appellant testified that he lived at the home of Mrs. Feazel and her children for seven or eight months and that then they were married in February, 1932; that thereafter he and his wife lived together a little over a week when they separated; that later he secured a divorce; that the child Hollistine was born July 4, 1932. He denied that he had had sexual intercourse with Lillie Feazel during the period of 250 to 280 days prior to July 4, 1932, or ever prior to the date of said marriage. He stated that Lillie





Patterson, his wife, formerly Lillie Feazel died November 19, 1942, and that she had in no way claimed him as the father of Hollistine. He stated that he was not the father of Hollistine; that he furnished no one any information to put in the birth certificate which showed him to be the father of Wendell Hollistine Patterson. He denied that he had ever admitted that he was the father of Hollistine. He stated that before said marriage, he was simply a roomer in the home of Lillie Feazel and paid her for his room rent.

Two witnesses testified on behalf of appellant, - John Jones and Verner E. Joyner. John Jones testified that he was a friend of appellant and had visited him at this house before and after marriage; that appellant's room was in the Southwest corner of the 4-room house; that when visiting there he had never seen Lillie Feazel and appellant sleeping together before or after they were married.

Verner E. Joyner, Clerk of the Circuit Court, testified in regard to a certain divorce case, No. 3004, brought by Absalom Patterson against Lillie Patterson. The clerk testified that he could not find that any decree was filed for record in that case. Defendant offered the minutes of the trial judge's docket, which offer was objected to and sustained by the court. The minutes of the judge indicated that on June 14, 1932, a hearing was had. The minutes showed personal service, default, hearing on charge of adultery and divorce in favor of Complainant, Absalom Patterson against Lillie Patterson. It thus appears that the testimony of witnesses, on certain points, were apparently conflicting and that certain facts and statements made by witnesses were not questioned. The trial court heard and saw the witnesses and was in better position to judge of their veracity. We cannot say that the decision and judgment of the trial court were manifestly against the weight of the evidence. But, upon undisputed facts in the case, and the law, we feel that the judgment was correct.

The presumption of legitimacy arises in this case. In





itself, this presumption was amply sufficient to support the judgment. The presumption of legitimacy attaches to every child and must be overcome by clear and convincing proof. One claiming illegitimacy has the burden of establishing that fact. Sugrue vs. Crilley, 329 Ill. 458, 464. This presumption is so strong that it is not overcome by proof of ante-nuptial conception. Zachmann vs. Zachmann, 201 Ill. 380; 7 Am. Jurisprudence-Bastards-Page 637, Sec. 16. The institution or the pendency of a divorce proceeding for months before the time in question will not overcome the presumption of legitimacy. Drennan vs. Douglas, 102 Ill. 341, 344-345. Any child born during marriage is presumed to be legitimate. Orthwein vs. Thomas, 127 Ill. 554, 561-562.

If the trial court believed the testimony of the children of Lillie Feazel, then appellant and Lillie Feazel, as husband and wife, were living and sleeping together long before and after the conception of the child, Hollistine. The proof of the element of access could hardly be more strongly imagined. The court evidently believed these witnesses and the others, for plaintiff. If the court believed these witnesses, then it did not believe the testimony of appellant in his claim that he had never had intercourse with Lillie Fraezel until after his marriage to her in February, 1932. The evidence indicated the birth of another child to appellant and appellee which had died, and whose burial expenses he had paid. If the court believed the testimony in regard to appellant's admission in regard to this child that died, his statement that he had never had such intercourse, was false. It is true that the parentage of this child that died is not the issue for determination here, but it was proper evidence on the question of access and whether appellant testified truthfully when he said he had never had intercourse with Lillie Feazel before February, 1932.

We find ample competent evidence in the record to support the finding and judgment of the trial court. Whether the birth certificate was properly admitted in evidence without first adducing





proof that appellant authorized the statements therein of the name of the child as Patterson, could not change the finding. The date of the birth of Hollistine was otherwise proved. The court found that Hollistine was the legal child of Absalom Patterson. It is therefore proper that in the birth certificate she should be designated by the name of Patterson.

The trial court was justified in finding under the evidence of facts and circumstances appearing in evidence in this case that the appellant and Lillie Feazel were living together in the relationship of a common law marriage. Common Law marriage was void under the law. But there was a subsequent legal marriage. Testimony of defendant regarding this marriage can only be held to be a marriage, under license, which then, under the law, was legal. This marriage removed the question of legitimacy of Wendell Hollistine Patterson by virtue of the Statute. Illinois Revised Statute, Ch. 89, - Marriages - Section 4. By virtue of this legal marriage, and the Statute, Wendell Hollistine Patterson became and is and is deemed to be the legitimate child of appellant and her mother, Lillie Patterson.

The questions of fact have been determined by the trial court, and since we cannot say that the determination of the trial court is against the manifest weight of the evidence, it becomes and is our duty to affirm the judgment in this case. Wendell Hollistine Patterson being the lawful child of appellant, it becomes and is the duty of appellant to provide for her support.

Accordingly, the judgment should be, and hereby is, affirmed.

JUDGMENT AFFIRMED.

Abstract.

FILED  
JUL 7 1945  
*Charles R. Brown*  
CLERK OF THE APPellate COURT  
COURTH DISTRICT NO. 1, ILL.





STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT  
May Term, A. D. 1945.

Agenda No. 2.

Term No. 45F4

THE PEOPLE OF THE STATE OF  
ILLINOIS,  
Defendant in Error,  
vs.  
CATHERINE ELIZABETH PETERS,  
Plaintiff in Error.

Writ of Error  
to the Circuit Court  
of Madison County,  
Illinois.

326 I.A. 512<sup>1</sup>

BRISTOW, P. J.

This cause comes here on Writ of Error to the Circuit Court of Madison County, Illinois, to review the record and conviction of Catherine Elizabeth Peters, Plaintiff in Error. The jury found the defendant guilty and imposed upon her a sentence of one year in the County Jail.

The indictment was based upon Section 44, Chapter 38 of the Illinois Statutes, entitled "Concealing Death of Bastard", which reads as follows: "If any woman shall endeavor, privately, either by herself or by the procurement of others, to conceal the death of any issue of her body, which if born alive would be a bastard, so that it may not come to <sup>light</sup> ~~life~~, whether it shall have been murdered or not, she shall suffer confinement in the County Jail for a term not exceeding one year."

November 8, 1940, Catherine Elizabeth Peters was married to Clifton D. Monaghan. They lived together as husband and wife until June 1, 1941. They had separated twice. On October 7, 1943, in the Circuit Court of Madison County, Catherine Monaghan obtained a divorce from Clifton D. Monaghan on the ground of desertion.

Following their separation, Catherine Monaghan went to the home of her parents in Wood River, Madison County, Illinois, where





she has since lived, and on October 24, 1943 she gave birth to a child at her mother's home in Wood River.

The mother of Plaintiff in Error, by request of the States Attorney, was a Court's witness. She testified that, on December 4, 1943, she went to a coal shed at the rear of her premises, about seventy-five feet from the house, and that a dog ran out of the open door of the shed. On the board floor, inside, near the door, she found a badly mutilated object, covered with dirt. She called a neighbor lady and the police. The coroner later took possession of the body. It was the dead body of a white child.

Witnesses testified in regard to an autopsy on the child, stating that it was living, at birth. The doctor testified that, with the consent of Plaintiff in Error, he examined her on December 6, 1943, and that the examination showed that she had given birth to a child within the preceding two or three months.

The police, the coroner and a newspaper reporter testified that to them or in their presence, verbally and by two lengthy typewritten statements, signed by Plaintiff in Error, that Plaintiff in Error had made certain admissions. On December 6, 1943, she was taken into custody. She denied she had given birth to a child. She readily agreed to submit to an examination by a doctor. On December 7th and on December 13th, 1943, and after several lengthy sessions with the States Attorney and his assistants, the coroner and police officers, Plaintiff in Error made a statement regarding the affair, which was reduced to writing, and signed by her. The coroner stated that Plaintiff in Error told him the name of the father of her child by writing the name down on a piece of paper, which he had misplaced. He said the name was not that of her husband, but that he could not remember the name she had written.

The two signed statements were introduced in evidence. In these statements she said she had become pregnant the latter part of January or in February, 1943; and in the statement recited at





great length and in detail the facts of the birth of a child to her, on October 24, 1943. The substance is, that on that day she became sick, thinking she had been poisoned by food she had eaten; that she was home and in bed; that the child was born; that her mother and brother left the house without any knowledge of the occurrence; that after an hour or so, she wrapped a newspaper around the child which then was not living; that she took the body to this coal shed, sat down and thought for quite some time; and then buried it in the dirt floor of the coal shed; and that no member of the family or anyone else knew that she had been pregnant, and had given birth to a child and had buried it.

Testimony that had been given by Plaintiff in Error, her mother, and a witness, at the divorce suit, was introduced in evidence. There she testified, that in 1941, when she came home from work, her husband was gone and that she hadn't seen him since or lived with him since. The mother and the witness who testified at the divorce proceeding said that Plaintiff in Error and her husband had not lived together since their separation.

As the court's witness in the trial below, the mother testified that she didn't know her daughter and son-in-law had separated; that they were not living together. When asked whether she had seen her son-in-law in Wood River after May or June, 1941, she made the reply, "No, I guess she did." When again asked whether she had seen him after May or June, 1941, she said she believed she had one time down town, that she was pretty sure she did. She testified that her son-in-law went into military service in the army in 1941, and that she thought he was discharged from the army later. She testified that her daughter and her son-in-law corresponded by mail, that she guessed he lived in Cairo, Illinois; and that he had sent his picture in uniform to his wife. The mother-in-law further testified that her son-in-law was discharged from and was out of the army for sometime and then went back, in May, 1943. She was asked if during that period of time, Catherine





wrote to him and he to her, and she replied, "yes". As to whether she knew he was in Wood River any period before May, 1943, she replied, "I believe he was. I am pretty sure of that, and part of the time in Cairo, Illinois". She stated she wouldn't know whether her daughter saw Clifton Managhan or not.

The above was all the material proof introduced in the case. Strenuous objection to introduction of most of the testimony and exhibits was made by the defendant, but all the objections were overruled. Defendant did not testify at the trial.

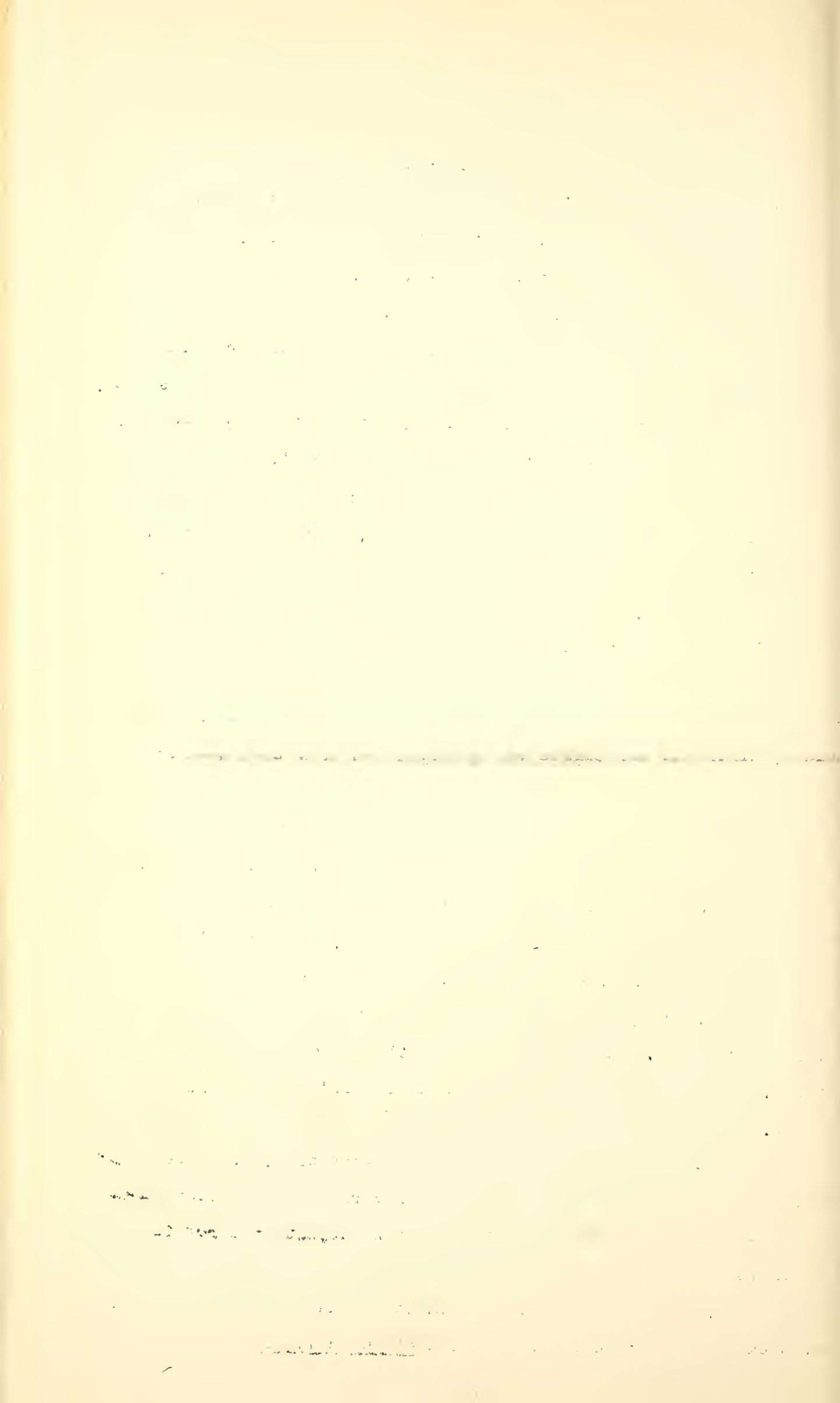
For about fourteen lines on the first page of the argument, Plaintiff in Error, by a general statement, refers to the voluminous testimony; objections made regarding the condition of the child's body; the inquest; and statement of the physicians. She then concludes that a large part of the testimony has no bearing and that the effect was to inflame the jury and give it the impression that the defendant must be guilty of something.

It was the duty of the Plaintiff in Error to explicitly point out testimony objected to and to give reasons why the court erred in overruling objections. The fourteen line general statement is not of much assistance to a court of review. Defendant in Error asserts that the Plaintiff in Error has not saved the points of objection, in that she has not been specific, nor covered objections by her assignments of error. Defendant in Error then proceeded at quite some length, to argue in support of the propriety of such testimony, to admission of which objections had been made at the trial. We believe that quite a few of the objections were well taken.

But, since on very careful consideration, we believe that this judgment of conviction should be reversed on the record made, we will not give further attention to the subject of error in admission of evidence.

Plaintiff in Error has almost exclusively addressed her argument to the proposition that the corpus delicti has not been





proven.

The Statute upon which the indictment is based requires the establishment of endeavor to conceal the death of a bastard. It was, therefore, incumbent upon The People in this case to establish the fact that the child in question was illegitimate.

The question of illegitimacy or not, of the child, in any case, is of great public concern. Accordingly it has been long and firmly laid down as a rule of law that any child born during marriage is legally presumed to be legitimate, and illegitimacy must be proven by those who allege it. This legal presumption has been announced in many decisions of courts of appeal, in this State. In Orthwein vs. Thomas, et al., 127 Ill. 554, 561-562, the court said: "and this presumption must prevail until the legal presumption of legitimacy, and which attaches to every child, is overcome by clear and convincing proof; and the burden of showing illegitimacy is, by the law, cast upon those who allege it". Other cases holding similarly are Sugrue vs. Crilley, 329 Ill. 458, 464; Zachmann vs. Zachmann, 201 Ill. 380, 383; Drennan vs. Douglas, 102 Ill. 341, 344-345.

It was incumbent upon The People to prove the impossibility of access of Clifton Monaghan with his wife during the time in question. In The People vs. Dile, Supra, Complainant in the bastardy proceeding testified that she had not seen her husband during the time that conception occurred and stated that another person was the father. Other witnesses there stated that they had not seen the husband in Lawrenceville, Illinois. In emphasizing the necessity of proof as to absence of the husband during the time in question, in the case of The People vs. Dile, at page 24-25, the court said "but their testimony is of such a character as to have little probative value to demonstrate the impossibility of access to his wife during the time in question. No witnesses were called from Hammond to prove such inaccessibility. Hammond is distant seven to nine hours travel from Lawrenceville."





Cairo is distant only about 140 miles from Wood River. The evidence further shows that Clifton Monaghan lived in Cairo; that he had been discharged from the army and was in Wood River. He and his wife corresponded with each other by mail. He sent her a picture of himself in uniform, and the proof indicated that he was in Wood River before May, 1943, when he again went into the army. The People have failed to prove the impossibility of access of Clifton Monaghan. In Robinson vs. Ruprecht, 191 Ill. 424, the court considered a case which is illustrative of the kind of proof that will be adjudged rebuttal of the presumption of legitimacy where it said, at page 432, that, "It appeared in the proof that there was no possibility of access to the mother \*\*\* in such state of case the presumption cannot prevail." In The People vs. Gleason, 211 Ill. App. 380, 383, a child was born five days after marriage. It had been conceived several months before the husband and wife had ever seen each other. Accordingly the court said that the presumption that every child born in wedlock is legitimate, was rebuttable when the proof conclusively showed that it was impossible that the husband could have been the father of the child.

In this case, under the peculiar provision of the Statute in question, the corpus delicti is not established until it has been proven that the body found in the shed was a bastard. Such facts cannot be established by the admissions and confessions of the Plaintiff in Error alone. Wistrand vs. The People, 213 Ill. 72; The People vs. Nachowicz, 340 Ill. 480; Gore vs. The People, 162 Ill. 259; The People vs. Hoffman, 381 Ill. 460. Impossibility of access was not established by the proof offered by The People in this case. Except by the statements of the mother of the Plaintiff in Error, at the trial, The People have failed to produce any proof concerning the whereabouts of Clifton Monaghan in January and February of 1943, the time in question. The testimony of the mother would indicate that there was quite a friendly feeling existing at that time between her daughter and son-in-law. Cairo, Illinois,





would be only a few hours travel from Wood River, which fact alone would indicate a clear possibility of access.

We have carefully considered the evidence. It is unsatisfactory and is not of that conclusive character required in a criminal case to justify conviction. On this record, there remains a serious and well founded doubt of proof of Defendant's guilt beyond a reasonable doubt. The People vs. McMahon, 254 Ill. 62, 71; The People vs. Abbate, 349 Ill. 147, 151; The People vs. Kratz, 311 Ill. 118; The People vs. Gold, 361 Ill. 23, 31-32; The People vs. Langaas, 339 Ill. 267.

Accordingly it becomes the duty of this court to reverse the judgment of conviction.

The judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Abstract.

FILED  
JUL 7 1945  
*Stanley R. Brown*  
CLERK OF THE APPELLATE COURT  
NORTH DAKOTA





326

STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT  
May Term, A.D. 1945.

Agenda No. 5

326 I.A. 512

Appeal from the  
Circuit Court of  
Saline County.

Term No. 45F6

G. H. FRITCH,  
Plaintiff-Appellant,  
vs.  
LUKE BARNHILL,  
Defendant-Appellee.

STONE, J.

This suit was instituted in the Circuit Court of Saline County by G. H. Fritch, Plaintiff-Appellant (hereinafter called plaintiff), against Luke Barnhill, Defendant-Appellee, (hereinafter called defendant) to recover part of the purchase price alleged to have been received by defendant, as agent and broker for plaintiff, for lands sold to one A. C. Wooten, the purchaser.

The complaint alleged that defendant was his agent to sell a certain farm, the property of plaintiff, and that he had collected and received from A. C. Wooten, as a part of the cash payment to be made on the completion of the deal, the sum of Three hundred dollars, (\$300.00) and that defendant had not paid said sum or any part thereof to plaintiff.

Defendant thereafter filed his answer, setting out that he had tendered to plaintiff the sum of \$36.88, in payment of the claim alleged in the complaint, which tender was refused, and that ever since said defendant was ready and willing to pay said sum of money and tendered same into court.

Plaintiff thereupon filed his replication to said answer, admitting the tender and refusal of plaintiff, alleging the refusal to be for the reason that the same was not the full amount demanded





by plaintiff in his complaint.

Following the filing of this replication, plaintiff filed a motion for a judgment on the pleadings, in the sum claimed in his complaint, and as basis of said motion alleged that every material and triable allegation of fact set forth in the pleadings of plaintiff were admitted.

The Court overruled this motion, trial was had, and judgment entered in favor of plaintiff and against defendant for \$36.88, and judgment in favor of defendant and against plaintiff for costs. From the judgment of the court overruling the motion for judgment on the pleadings and the subsequent orders and judgments entered thereafter this appeal is taken.

It is assigned as error that the court erred in overruling the motion of plaintiff for a judgment on the pleadings; in entering judgment in favor of plaintiff and against defendant for \$36.88, and in adjudging the plaintiff to pay the costs of this suit.

It is contended by counsel for plaintiff, that defendant, by failing to make specific denial of any of the allegations set forth in the complaint, admits as true each and every allegation appearing therein; that he admitted the receipt of the money for the purpose stated and that no part of the money so received had been paid, and that he, the defendant sought to defend against an admitted obligation of \$300.00, admittedly wholly unpaid by a tender of only \$36.88, and that therefore the trial court should have sustained plaintiff's motion for a judgment on the pleadings.

From the judgment of the trial court, we can reasonably infer that the court heard evidence sufficient to convince that the difference in amounts had been legally accounted for.

A plea of tender and bringing the money into court is an admission of plaintiff's cause of action to the extent of the amount alleged to have been tendered and brought into court, and dispenses with the necessity for all that proof which plaintiff would otherwise be required to produce in order to recover the amount brought in,





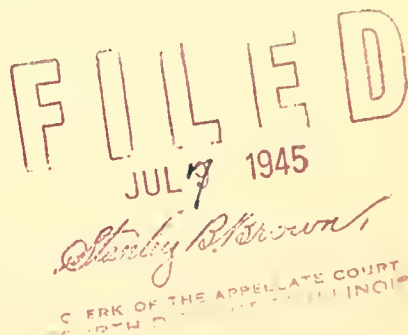
and defendant cannot thereafter object to the form of action or that the action was prematurely brought, so far as the amount so tendered is concerned, but it is not an admission of liability beyond the amount tendered nor does it necessarily admit all of the alleged grounds of recovery. *Mulcahy vs. Melford*, 213 Ill. App. 423. In the instant case, the answer of defendant to the complaint and reply thereto of plaintiff raised the single issue of whether the sum of money due exceeded the amount of the tender. The only question for the court to determine, on the issue so joined was as to the amount of damages. *Frew vs. Illinois Central R. R. Co.*, 57 Ill. App. 42; *Chicago & Great Western Ry. Co. vs. Hogan*, 56 Ill. App. 577. This being so, the trial court did not err in overruling motion for judgment on the pleadings.

When the issue of tender is found for defendant, the proper practice requires the court to render judgment in favor of defendant for costs. *Frew vs. Illinois Central R. R. Co.* supra; Sect. 3., Chap. 135 Ill. Rev. Stats. 1943.

We believe that the judgment of the trial court was right and the judgment will be affirmed.

AFFIRMED.

Abstract.







326 211 11

STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT

A

May Term, A. D. 1945.

Term No. 45F7

Agenda No. 8.

JENNIE STRONG,

Plaintiff-Appellee,

vs.

JOHN W. STRONG,

Defendant-Appellant.

Appeal from the City

Court of East St. Louis.

STONE, J.

326 I.A. 513

Jennie Strong, Plaintiff-Appellee, who will be herein-  
after designated as plaintiff, filed her suit for separate  
maintenance in the City Court of East St. Louis, on September 19,  
1944, against John W. Strong, Defendant-Appellant, her husband, who  
will be hereinafter designated as defendant. Her complaint  
alleged that the parties were married on the 13th day of March,  
1944, and separated on or about the 18th day of September, 1944, and  
as grounds for her action alleged that defendant struck her on or  
about the 9th day of July, 1944, and that on said date and on  
various other occasions defendant had been guilty of such conduct  
as to make plaintiff's life miserable and intolerable and endanger  
her life and her health, necessitating plaintiff's putting herself  
under the care of a doctor. A temporary injunction was prayed for  
and granted, enjoining defendant, among other things, from coming  
on or about the premises where plaintiff resided. The answer filed  
by defendant denied the allegations of the complaint.

Upon a hearing the Court entered a decree granting plain-  
tiff separate maintenance, from which decree appeal is prosecuted  
to this Court. It is alleged among other things as ground for  
error, that the Court erred in rendering a decree because the finding





and decree in the case is against the manifest weight of the evidence, and that the Court erred in awarding separate maintenance to plaintiff.

The record discloses that both of the parties hereto had been married before, and that the twenty year old daughter of plaintiff, for a time at least, made her home with them at 1418 Exchange Avenue, East St. Louis, which was the residence of defendant before his marriage to plaintiff. The one act of cruelty alleged in plaintiff's complaint and testified to by her occurred on July 9, 1944, at which time, so she testified, defendant slapped her, and that the thing that led up to that was that she had heard his dead wife's name, morning, noon and night. Defendant admits slapping her on this occasion, and claims that there was some provocation for that, inasmuch as plaintiff and "called me a name involving my mother's character". In rebuttal, the plaintiff testified that she called him a name, after she was struck, and not before. However, they both testify that they were reconciled after this incident, and plaintiff testified that they lived together as husband and wife until on or about September 18th, 1944, shortly before the separation. The record discloses no other act of physical violence or threat of violence on the part of defendant after July 9th.

It would seem reasonable to believe that the logical time for plaintiff to have separated from defendant, if, as she alleged in her complaint, her life was endangered, was immediately after the act of July 9th. But this was condoned and there was no subsequent act to renew it.

Plaintiff testified that one night "he was kissing me like any other married couple does when they go to bed. Instead of having natural intercourse, he got down with his mouth before I knew what was happening \* \* he just leaned over there and put his mouth on it \* \* on my vagina." She further testified that since that time he had asked her to do the same thing. This was denied in its





entirety by defendant. Counsel for plaintiff designate this as sodomy and claims that this would constitute a second act of cruelty upon the part of defendant. Chap. 39, Sec. 141, Ill. Rev. Stat. 1943, defines sodomy as the infamous crime against nature, either man or beast. Dr. Krafft-Ebing, authority on sex perversions describes bestiality (connection with animals) and pederasty, under the general term of sodomy and points out that the original meaning of sodomy used in Genesis (Chapter 19) signified pederasty, i.e. anal coitus between men.

Plaintiff claims, by inference at least, that this alleged act on the part of defendant brought on a nervous collapse, and that she was under the care of a physician for a month and that thereafter she was under the care of a chiropractor. Neither the physician nor the chiropractor testified in this case, for the purpose of showing any connection between any act on the part of defendant and the alleged physical condition of plaintiff. If the plaintiff was horrified by the alleged exhibition of unnatural sexual desires on the part of defendant, it was not apparent in the subsequent life of the parties. Thereafter and up until shortly before their separation, they ate at the same table, attended the theatre together and lived and cohabited as husband and wife.

The circumstances attendant upon the separation of the parties, is not as clearly outlined by the record as might be. Plaintiff's testimony is to the effect that defendant told her to get out several times. It is evident that she did not do so, but continued to live in the same house with defendant. The injunction allowed by the court enjoined defendant from coming on or about the premises where plaintiff resided, so it may be inferred that he left the premises where he had lived before he married plaintiff, not of his own volition, but because of the order of court.

We believe it significant that defendant testified that the Monday before plaintiff filed suit, she said to him that she wanted a final answer about the matter of making the bank account





a joint one, and that she said then that she was going to sue for divorce. She admits this in substance.

The record as a whole indicates that defendant was a man of sobriety, good habits, providing well for his wife, during the time that they lived together. He provided her with a comfortable home and the use of an automobile. There is some evidence that he cursed, but not that he cursed at plaintiff.

Plaintiff's daughter, who made her home with the parties litigant part of the time, was called as a witness on behalf of plaintiff and did not testify to a single act of misconduct on the part of defendant. Mrs. Ema Roney, a neighbor and friend of plaintiff for fifteen years was called as a witness for plaintiff, and her testimony was to the effect that she had been in their home hundreds of times, but saw or heard no misconduct on the part of defendant.

We realize that a reviewing court would have no right to disturb the findings of the chancellor who has heard the witnesses in open court and has seen them upon the witness stand, unless it can be said that the finding of the trial court is manifestly against the weight of the evidence. *People ex rel Hirsch vs. Nagel*, 243 Ill. App. 490; *Stephens-Adamson Mfg. Co. vs. Fireman's Fund Ins. Co.* 257 Ill. App. 443; *Wear Proof Mat. Co. vs. Bastian-Morley Co.* 268 Ill. App. 455. It has been held repeatedly in Illinois that incompatibility of disposition, slight moral obliquities, occasional exhibitions of passion, trivial difficulties, are not good cause for living apart. *French vs. French*, 302 Ill. 152; *Wahle vs. Wahle*, 71 Ill. 510; *Johnson vs. Johnson*, 125 Ill. 510; *Hellrung vs. Hellrung*, 321 Ill. App. 33.

Good cause for living separate and apart from her husband must be such conduct on the part of the husband as will directly endanger the life of the wife, her health, or person, or such course of conduct as will necessarily and inevitably render her life miserable and living with him as his wife unendurable. *Jackman vs.*





Jackman 213 Ill. App. 329; Johnson vs. Johnson, supra; French vs. French, supra; Hellrung vs. Hellrung, supra.

We are inclined to the belief that no one single act or combination of acts, taking into consideration subsequent condonations, on this record, would justify a decree for separate maintenance. In Deenis vs. Deenis, 65 Ill. 169, the Court said "Even in an application for divorce, where good ground once existed for a decree, condonation is an absolute bar to any remedy for the particular injury which has been forgiven. This principle applies as well to the case before us. The separation on the part of the wife must be 'without her fault'. If he has committed an offense which is forgiven, the offense no longer exists, and there can be no cause for the separation."

The view we take of the main question in the case makes it unnecessary for us to consider or discuss the other questions assigned as error.

For the reasons given the decree is reversed and the cause remanded with directions to dismiss the complaint for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

Abstract.

FILED  
JUL 7 1945  
*Stanley R. Brown*  
CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS





Abstract

Gen. No. 10,010.

Agenda No. 8.

326 I.A. 514

In the Appellate Court of the  
State of Illinois

-----  
Second District  
February Term, A.D. 1945.

People of the State of Illinois,	:	
	:	
Defendant in Error,	:	Writ of Error to the
	:	
v.	:	County Court of
	:	
Merle Hoffman,	:	Livingston County
	:	
Plaintiff in Error.	:	

Dove, P.J.:

Plaintiff in error, hereinafter for convenience called defendant, was convicted in the county court of Livingston County, of larceny of an air gauge used in testing the air pressure in automobile tires. The information charged that on August 28, 1944, the accused did steal, take and carry away 1 Schrader Service Gauge of the value of \$3.10, the personal goods and property of Elmer. Stahl. A jury trial was waived by defendant, and the trial was by the court without a jury. Motions for a new trial and in arrest of judgment were overruled, and the cause is here on writ of error.

It is first urged that the court erred in overruling the motion for a new trial, on the grounds that the People failed to prove the defendant guilty beyond a reasonable doubt, and that the evidence preponderates in favor of the defendant. The proofs show that he is an experienced auto-



Abstract

3881 A. 314

Gen. No. 10,010.

In the Appellate Court of the  
State of Illinois

Second District

February Term, A.D. 1940.

People of the State of Illinois,	:	
Defendant in Error,	:	
	:	v.
Wesley Hoffman,	:	Plaintiff in Error.
County Court of	:	
Livingston County,	:	

Docket, P. 11.

Verdict in error, judgment for defendant in error, affirmed, was entered in the County Court of Livingston County, of record of an abstract filed in the said Court on August 23, 1939, the amount of the said sum being \$1,000.00. The defendant in error, Wesley Hoffman, a duly qualified juror, was sworn by the Court, and the trial was by the Court without a jury. Motion for a new trial was denied. Judgment was affirmed, and the case is here on writ of error.

It is first urged that the Court acted in overruling the motion for a new trial, on the grounds that the People failed to prove the defendant guilty beyond a reasonable doubt, and that the evidence preponderates in favor of the defendant. The facts show that he is an experienced auto-

mobile mechanic, and operates a garage and filling station at Dana. The complaining witness, Elmer Stahl, operates a filling station at Cornell, about eleven or twelve miles east of Dana. Each of them had a Schrader service gauge of the same type and price. Mr. Stahl purchased his on October 30, 1943, and defendant purchased his on May 17, 1944, from different Chicago dealers. They cost \$3.10 each.

The uncontradicted evidence shows that on about August 18, 1944, Leslie Syphers, a truck driver, who had formerly worked at defendant's garage, borrowed defendant's air gauge and took it to the Woltzen garage, about one half block away, where there was no gauge that would test truck tires, and, after using it, laid it on the window sill outside the garage, and forgot it. About five or ten minutes afterwards, when he returned to get the gauge, it was gone, and he informed defendant about it, offering to pay for the gauge. A few days thereafter, while driving through Cornell, Syphers stopped at the Stahl filling station to fill a front tire on his truck. He testified that Mr. Stahl handed him defendant's air gauge, and that he recognized it by a peculiar crack, and by two identification marks used by defendant to mark his tools; that he said nothing to Mr. Stahl about the gauge belonging to defendant, but, upon reaching home, reported the finding of it to defendant. A few days thereafter, on August 28, 1944, defendant drove to the Stahl filling station, and upon inquiring of Mrs. Stahl for a tire gauge, was handed one by her. He thereupon claimed it was his, a dispute as to its ownership ensued with her and Mr. Stahl, and defendant took the gauge away with him. He testified that he asked Mrs. Stahl where they got the gauge, and that she said they bought it in Chicago for \$2.00; that he asked her to show him some identification



mobile mechanic, and operated a garage and filling station  
at Dana. The complainant witness, Elmer Stahl, operated  
a filling station at Danville, about fifteen or twenty miles  
west of Dana. Both of them had a telephone service garage  
of the same type and design. The Stahl purchased his on October  
30, 1943, and defendant purchased his on May 17, 1944, from  
different Chicago dealers. Their cost \$7.10 each.  
The undisputed evidence shows that on about August  
19, 1944, Leslie Symons, a truck driver, who had formerly  
worked at defendant's garage, borrowed defendant's car, drove  
and took it to the Western garage, about the time when  
where there was no more than would be found at the  
after using it, and it on the whole still about the same  
age, and forgot it. About five or six months afterwards,  
when he returned to get the garage, it was gone, and he in-  
formed defendant about it, offering to pay for the same.  
A few days thereafter, while driving through Danville, the  
others stopped at the Stahl filling station to fill a tank  
five or six times. He testified that the Stahl had had his  
defendant's car garage, and that he recognized it by a re-  
sultant check, and by two identification marks used by the  
tenant to mark his tanks; that he said nothing to the  
Stahl about the garage belonging to defendant, but, when  
passing home, reported the finding of it to defendant.  
A few days thereafter, on August 20, 1944, defendant drove  
to the Stahl filling station, and upon inspection of the  
Stahl for a time garage, he learned and by car. He immediately  
stated it was his, a Marlin as to the ownership shown  
with her and Mr. Stahl, and defendant took the car away  
with him. He testified that he asked Mr. Stahl where they  
got the garage, and that she said they bought it in Chicago  
for \$2.00; that he asked her to show him some identification

of the gauge, but that "she didn't seem to answer, she was so nervous": that they did not show him any identification of the gauge, and that he stated that he was going to take his own property; that he showed them the mark, and laid the gauge down on the counter, behind which Mrs. Stahl stood, and that he laid it down right in front of her.

Mr. Stahl testified that defendant did not exhibit any identification mark, but "covered it right up", and kept it in his hand so that they could not see it at all. Mrs. Stahl testified that while defendant held the gauge in his hand, he said; "Those are my initials", and that he would take the gauge. Defendant left his name and address, written on a piece of paper, with the Stahls.

A peculiar circumstance is that, on the trial, when the State's attorney showed the witness, Mr. Stahl, the gauge with the crack and the identification marks, which was obtained from the sheriff, he testified that it was not the gauge which he had bought and which was taken from his place of business; that his gauge was of the same type and number, but had nickel on it, all over, unless there might be some worn off the handle, and that he saw no nickel on the gauge then shown him. His wife testified substantially the same way. Other witnesses testified that the gauge exhibited on the trial was not the one Mr. Stahl had.

Defendant testified that the gauge produced on the trial was the one he took away from the Stahl filling station, and that it was the one he had bought and loaned to the truck driver. He and the truck driver identified it by the crack and the markings, and the evidence of several witnesses shows that the defendant marked his tools in the manner shown by the marks on the gauge produced in court. The People did not offer the gauge in evidence, and it was offered by the defendant. It appears from the evidence that Mr. Stahl and defendant each had only on



of the house, but that 'she didn't seem to notice, and was  
no nervous'; that they did not, that any identification  
of the house, and that he stated that he was going to take  
the car away; that he showed them the car, and said  
the car was on the counter, and that when Mr. Stahl took  
and that he said it was right in front of him.  
Mr. Stahl testified that Defendant did not exhibit any  
identification in court, but 'covered it up', and said it  
in his mind as they could not see it at all. That when  
testified that while Defendant held the car in his hand, he  
said; 'Where are my initials', and that he would take the  
car. Defendant left his name and address, written on a  
piece of paper, with the Stahl.

A peculiar circumstance is that, on the 1st of May, 1930,  
Stahl's attorney advised the witness, Mr. Stahl, the witness  
with the Stahl, and the identification cards, which was the  
taken from the Stahl. He testified that it was not the  
cards which he had bought and which was taken from his  
place of business; that the cards were in the name of the  
witness, but had picked up at all, and that the witness  
be some work off the family, and that he was no nearer on the  
ground than shown him. His wife testified substantially the  
same way. Other witnesses testified that the cards exhibited  
on the trial was not the one Mr. Stahl had.

Defendant testified that the cards received on the trial  
was the one he took away from the Stahl killing station, and that  
it was the one he had bought and turned to the truck driver. He  
and the truck driver identified it by the check and the markings,  
and the evidence of several witnesses shows that the defendant  
marked his tools in the manner shown by the marks on the papers  
produced in court. The People did not offer the cards in  
evidence, and it was offered by the defendant. It appears  
from the evidence that Mr. Stahl and Defendant each had a

gauge of the kind in controversy. No other gauge than the one produced in court was found in the possession of defendant. The testimony of Mrs. Stahl that he said: "Those are my initials", strongly tends to refute the testimony of her husband that defendant was concealing the gauge, and imports that he did exhibit the markings. The truck driver testified positively that he saw the gauge at the Stahl filling station a few days previously.

A logical inference from all the testimony is that the party who took defendant's gauge from the window sill of the Woltzen garage, surreptitiously substituted it at the Stahl filling station for the gauge belonging to Mr. Stahl, in order to cover his speculation, and that the Stahls did not notice the substitution. Nothing in the People's testimony lessens this inference. There is no question but what the gauge produced in court belongs to defendant, and it was obtained from the sheriff. The weight of the testimony shows that it is the gauge which defendant took from the Stahl filling station. While, on disputed questions of fact, much weight is to be given to the findings of a jury, or of a trial judge, that rule does not prohibit the reversal of a judgment which is manifestly against the weight of the evidence. Our conclusion is that the People failed to prove the defendant guilty beyond a reasonable doubt.

Moreover, it is fundamental that in order to constitute the crime of larceny, there must be a felonious intent, and a union of act and intent. While sometimes an intent may be inferred from the act, the circumstances in evidence in this case are not such as to raise the element of intent from the act of the defendant, and we find that proof of the element of intent is wholly lacking here. Defendant went to the Stahl filling station in broad daylight, claimed the gauge as his own, from the crack and the markings thereon, and the



[illegible]

testimony of Mrs. Stahl corroborates his testimony that he exhibited the markings. Leaving his name and address with them also negatives the intent necessary to constitute the offense charged.

The trial court erred in denying the motion for a new trial on the grounds mentioned. Because of this, it is unnecessary to discuss any of the other grounds urged for reversal. The judgment is reversed and the cause is remanded.

Reversed and remanded.



testimony of Mr. Smith corroborated his testimony that he exhibited the machine. Leaving his name and address with them also negatives the intent necessary to constitute the offense charged.

The trial court erred in denying the motion for a new trial on the ground mentioned. Because of this, it is unnecessary to discuss any of the other grounds urged for reversal. The judgment is reversed and the cause is remanded.

Reversed and remanded.

Abstract

Gen. No. 10024

Agenda No. 17

In the Appellate Court of the  
State of Illinois

Second District  
February Term, A.D. 1945

1853

Agnes La Prise, Administrator of  
the Estate of Harold La Prise,  
Deceased,

Appellant,

v.

Carr-Leasing, Inc., a Corporation,  
Frank-McCrory and John Rehak,  
Appellees.

Appeal from the

Circuit Court of

DuPage County

3261.A. 514<sup>2</sup>

Dove, P. J. -

Appellant's intestate was found dead at about 8:30 o'clock, A.M., on October 21, 1943, about five feet off of the south side of the graveled portion of Warren Avenue in the Village of Downers Grove, about one-half block east of its intersection with Woodward Avenue. Appellant instituted suit in the circuit court of DuPage County against appellees to recover damages on account of his death, alleging that while the decedent was walking easterly on Warren Avenue, he was struck and killed by a certain motor vehicle, commonly known as a taxi-cab, owned by Carr-Leasing, Inc., and Frank McCrory, and being driven easterly by their servant, John Rehak.

The complaint also alleged due care and caution on the part of the decedent, with allegations of negligence of the defendants in one or more of the following acts; in driving, management and control of the motor vehicle; failure to keep a proper and sufficient lookout for persons on the highway; failure to give warning of the approach of the motor vehicle, in violation of section 115 of the Uniform Motor Vehicle act; and a rate of speed greater than was reasonable and proper,





having regard to the traffic and the use of the highway. Except an admission by Carr-Leasing, Inc., that it was the owner of a certain motor vehicle, commonly known as a taxi-cab, issue was joined on all the other material allegations of the complaint. The answer of Carr-Leasing, Inc., was amended to read: "Carr-Leasing, Inc.", the suit was dismissed as to Frank McCrary before the trial, and at the close of the plaintiff's case the court sustained motions of the two remaining defendants for a directed verdict in their favor, a verdict was returned accordingly, judgment was entered thereon, and this appeal followed.

The grounds urged for reversal are that the court erred in sustaining objections to the offer in evidence of a map of the streets of Downers Grove, and to the offer of a picture of the body of the decedent taken before it was moved on the morning in question; in not admitting in evidence a picture of the taxi-cab as it appeared on the afternoon of that day; in permitting re-examination or cross-examination of John Revak by his own counsel at the close of his examination under section 60 of the Civil Practice Act; in permitting the re-examination and cross-examination to go beyond the examination; in giving the instructions directing a verdict for the defendants; in entering judgment on the verdict; and in overruling appellant's motion for a new trial.

The map of the streets of the Village was denied admission on the ground that it was not helpful and was likely to confuse the jury, that nothing was shown on the plat that could not readily be shown by testimony, and that much appeared thereon that had nothing to do with the case. The testimony of the witnesses discloses in detail the streets involved on every material phase of the issues, the directions in which



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they run, their situation with respect to each other, the names of the streets, distances and directions shown to have been traveled by the taxi-cab, the locations of the residences of the parties involved, the objectives of the parties, and everything necessary to a full understanding of the issues. Admitting the map in evidence would not have thrown any light on any controverted point not shown by the testimony of the witnesses. Under such circumstances, there was no error in refusing to admit the map in evidence. (Schneider v. North Chicago Street Railroad Co., 80 Ill. <sup>apps.</sup> 306, 309: 32 C.J.S. Sec. 709, p. 612.)

After the chief of police of the Village had testified in detail to the position of the body shortly after it was found, with the head to the east, the nose in the dirt, the position of the decedent's dinner pail, his cap and some papers, the photograph of the body was offered in evidence and denied admission. None of the testimony of the witness was contradicted, and the photograph could have served no useful purpose. It obviously might tend to inflame and prejudice the jury, and there was no error in refusing to admit it in evidence. (Wigmore on Evidence, Vol. 2. secs. 1156, 1158, pages 1352, 1355; Louisville and Nashville Railroad Co. v. Pearson, 97 Ala. 211, 219, 12 So. 176; Selleck v. City of Janesville, 104 Wis. 307, 80 N. W. 944.)

As to the failure of the court to admit the photograph of the taxi-cab in evidence, the record shows that at the time it was offered and objected to, the court states that he would reserve his ruling "for the present", and appellant did not thereafter request the court to pass upon her offer. Without a ruling of the court there is nothing in the record on this point for us to consider.

John Rehak was called as an adverse witness by appell-



and, while it is true that the evidence is not as strong as it could be, it is still sufficient to establish the fact that the defendant was the author of the crime.

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As to the failure of the court to admit the testimony of the witness in evidence, the record shows that at the time it was offered and objected to by the defense, the court refused the ruling "for the reason," and appellant did not thereafter request the court to hear any other. With out a ruling of the court there is nothing in the record on this point for us to consider.

ant under Section 60 of the Civil Practice act. At the close of his examination by appellant's counsel, it was proper to permit his own counsel to examine him as to all matters relative to which he had been interrogated by appellant's counsel. (Combs v. Younge, 281 Ill. App. 339, 348; Kubin v. Chicago Title and Trust Co., 307 id. 12, 19; Branch v. Woulfe, 300 id. 472, 478; Blumb v. Getz, 294 id. 432, 438.) No place in the record or abstract is pointed out or referred to by appellant where the examination of Rehak's counsel went outside the scope of his examination by appellant's counsel, and under the well settled law this court will not explore the record to find some ground for reversal. Moreover, from our examination of the testimony to determine whether the court properly directed a verdict, we find no ground for such a claim.

The remaining question is whether the court erred in directing a verdict for the defendants, which necessitates an examination of the evidence. The testimony shows that the Chicago, Burlington and Quincy railroad runs east and west through Downers Grove. Among the north and south streets, in the neighborhood involved, in their order from east to west are Main Street, Forest, Oakwood, Carpenter, Lee, Cornell, Stonewall, Woodward and Belmont road. The first street east of Belmont Road which crosses the railroad is Forest, and the next one is Main Street. South of the railroad, some of the intersecting east and west streets, in their order from north to south, are Burlington, Curtiss, Chicago Avenue, Prairie, Warren, Franklin, Junior Court, Elmar, Howard and Maple. There is some inconsequential confusion in the testimony of Mr. Rehak as to whether Warren is north or south of Franklin, but his testimony shows there is no intersecting street between Warren and Prarie, and that in going north on Lee, it is necessary to





pass Warren and go on north to Prairie before turning east. The office and parking lot of the taxi-cab company are at Main Street, between the railroad and Burlington street.

It appears from the testimony of appellant, who is the widow of the decedent, that they and their three children lived on the east side of Belmont Road, some distance south of the railroad; that the decedent was employed at the Chicago post office, and was in the habit of boarding the 5:22 A.M. train for Chicago at the Belmont Road station each morning; that when he missed the train he would walk to the main portion of Downers Grove, the closest way being by Warren Avenue (the street where his body was found); that he left home on the morning in question at about the usual time; and that about fifteen minutes after he left, she heard a car racing down Belmont Avenue going north.

John Rehak lived on Belmont Road in the second house south of Maple, about one-half mile south of the LaPrise residence, and about one mile south of the railroad. He testified that he was employed by "DuPage Yellow Cab"; that there were four drivers, who took turns on the night shift; that on the evening of October 20th, he went on duty at 5 o'clock, P.M., and worked until 2 o'clock, A. M. the following morning, and then, after delivering some passengers from the 2 o'clock, A. M. train, went home, having a call to pick up Mrs. Marie Perkins at 5:30 A.M. Mrs. Perkins lived at 4913 Oakwood, about three-fourths of a block north of Franklin, and was in the habit of going early each morning by taxi-cab to the school where she was employed on Forest, between Burlington and Curtiss, about 3 1/2 blocks north and east of her home. Mr. Rehak testified that he left home about 5:15 A.M. and that it was dark; that from his home he drove north on Belmont Road to





Maple, east on Maple to Carpenter, north on Carpenter to Curtiss, north on Curtiss to Burlington, east on Burlington to Main Street and turned into the parking lot, which was the shortest and most direct route from his home to the cab office; that the office was left unlocked and there was a pad and pencil for customers to leave orders; that he stayed only long enough to see if any slips were posted for calls, and to unlock the money box, and then left for the Perkins home, traveling south on Forest to Prairie, and from Prairie south on Oakwood, to the Perkins home, turned into the driveway, and found her waiting. The record shows that over these routes, the distance from the Rehak home to the cab office is two miles, and from the cab office to the Perkins home is seven-tenths of a mile. Mrs. Perkins testified that on the trip to the school they went north on Oakwood to Chicago Avenue, east to Forest, and north on Forest to the school, arriving at 20 minutes before six o'clock, as shown by the electric clock at the entrance which was a little earlier than her usual time of arrival. Mr. Rehak testified that from there he went to Westmont to pick up one of the drivers living north of the railroad on Washington Street, and drive him back to the taxicab office, arriving at about ten minutes before six o'clock; That Mrs. Perkins was the first person that he saw that morning after leaving home, and that he was not on Warren Avenue from the time he left home until he picked up Mrs. Perkins.

Fred Edwards testified that on the morning in question, he was going home from work and reached the intersection of Warren and Cornell at 5:20 A.M., fixing the time by a clock in a gas station; that as he turned the corner, going north on Cornell, he heard a kind of thud, and looking west saw the head-lights of a car a couple of blocks west, and that it



[illegible]

looked to him as though it had stopped; that the lights flickered and the car then came on east and passed the corner when he was about one-half block north; and that he heard it stop after it passed Cornell. He did not attempt to identify the car as a taxi-cab or as the one driven by Mr. Rehak.

The chief of police testified that he examined the taxi-cab driven by Mr. Rehak, at about 2:30 P.M. that day; that there was a dent in the top of the right fender, about 8 inches wide, ten inches long, and possibly 1 1/2 inches deep at the deepest part, with no paint knocked off; a dent in the right side of the hood, the right side of the cowl dented down, and the right half of the wind-shield cracked, with three lines from an impact, starting at the bottom and flared toward the top. Mr. Rehak testified that when he left home that morning, and when he left the car in the parking lot, there were no cracks in the windshield, and no dent in the right fender, the cowl or the hood; and that he left the keys in the car that morning. Mrs. Perkins testified that she sat on the right hand side of the taxi-cab, in the rear, and did not notice any windshield that was cracked or shattered, nor anything unusual about Mr. Rehak's appearance or condition; that he did not appear excited or nervous, and that she did not notice anything out of the ordinary that morning, and did not observe the windshield at all.

The physician who examined the body of the decedent at about 8:45 A.M. that morning, testified that he examined it all over with the clothes off, for fractures, bruises and anything that he could find, and found no bruises, and no fracture except a compound fracture of the left leg midway between the knee and the ankle, and found no other injuries; that the examination was fairly thorough, and that in his opinion the



The first of these is the fact that the
 government has been unable to
 maintain a consistent policy
 towards the various
 groups of people who
 are affected by the
 situation. This has
 led to a lack of
 confidence in the
 government and a
 feeling of
 helplessness
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decedent died from shock and exposure, with possible suffocation from his nose being buried in the ground; that rigor mortis had set in, and that he figured that the decedent had been dead about two or three hours.

Under a motion by a defendant for a directed verdict, the court does not weigh the evidence, or determine its preponderance, but the sole question presented by the motion is whether the evidence, with all reasonable inferences to be drawn therefrom, fairly tends to prove the charges in the complaint. (*Bartolucci v. Falletti*, 582 Ill. 168, 175.) In the case at bar, appellant's case against Car-Leasing, Inc., is based on the doctrine of respondeat superior, and in order to make a case against that corporation, it was incumbent upon her to establish that the relation of master and servant existed between it and Mr. Rehak. She made no such proof, and Mr. Rehak testified that he was employed by "DuPage Yellow Cab", and there is no testimony in the record which tends to identify DuPage Yellow Cab with Car-Leasing, Inc.

Furthermore, there is a fatal defect in appellant's case, in that there is no proof that shows or tends to show that he was in the exercise of ordinary care for his own safety at or before the time he was killed, and there is no proof that he was a man of careful habits, and no testimony on either of these points was offered. Under these circumstances, it is unnecessary for us to discuss whether the testimony on the other issues was sufficient to require submitting the issues on those points to the jury.

Such tragedies as the death in this case are deplorable, and excite the sympathy of everybody, but, under the settled rules of law, in order to recover damages in such a case, the plaintiff must establish his cause of action by prov-





ing the necessary facts, or by proving facts from which the charges may reasonably be inferred. Because of the fatal omissions in the testimony, above mentioned, the trial court correctly granted the motions for a directed verdict, and the judgment is affirmed.

Judgment affirmed.



The following are the names of the persons who have been appointed as members of the Board of Directors of the National Association of Manufacturers:

Mr. J. B. Connelley, President, American Cyanamid Co.  
Mr. C. F. Johnson, Vice-President, General Electric Co.  
Mr. W. H. Rouse, Secretary, International Harvester Co.  
Mr. E. A. Tamm, Chairman, Federal Reserve Board  
Mr. J. P. Morgan, Jr., Chairman, J. P. Morgan & Co.  
Mr. G. D. Sikes, Chairman, U. S. House of Representatives

Abstract

General <sup>No.</sup> number 9451.

Agenda number 3.

IN THE APPELLATE COURT

OF ILLINOIS

THIRD DISTRICT

FEBRUARY TERM, A. D. 1945

MARIE E. SULLIVAN and  
PERCY B. SULLIVAN,

Plaintiffs-Appellees,

-vs-

HENRY H. MOREY,

Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT  
OF MACON COUNTY.

326 I.A. 553

~~HONORABLE C. Y. MILLER,~~  
~~Judge Presiding.~~

HAYES, J.:

Plaintiffs Percy B. Sullivan and Marie E. Sullivan brought suit in the Circuit Court of Macon County to cancel certain notes and mortgage given by them to the defendant, Henry Morey. The trial court entered a decree in favor of the plaintiffs and Morey has appealed to this Court.

Morey, an attorney at law, represented Percy Sullivan in numerous transactions over a period of years. In 1928 he was associated with another attorney in a successful defense of Sullivan in a criminal case in Piatt County and was equally successful in securing the dismissal of a related civil suit against Sullivan. Morey testified that he was not paid for these services. On April 2, 1928 Sullivan sold Morey a note of one Harvey Morrell of the face amount of \$685.00. Suit was brought on this note by Morey in the Circuit Court of Cook County which held the note to be void. On March 6, 1930 Sullivan





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was indicted for confidence game in Livingston County and asked Morey to represent him. The latter made three trips to Pontiac, Illinois with Sullivan to negotiate with the State's Attorney there about a bail bond before surrendering Sullivan. A surety Company bond was demanded and Morey hypothecated certain federal bonds owned by him to indemnify the surety company in order to obtain the bail bond. About two days later Morey asked the Sullivans to sign a note for \$3000.00 and a mortgage on a subdivision owned by Mrs. Sullivan. On March 14, 1930 the note and mortgage were executed by the Sullivans. They contend that these instruments were given to indemnify Morey, should his bonds be forfeited. Morey testified that they were intended to evidence Sullivan's indebtedness to him for past legal services, for rent, for the use of his bonds and for fees to be incurred in Sullivan's defense in Livingston County. The indictment in Livingston County was dismissed at Morey's behest as was a subsequent one for the same offense. A conviction on a third indictment was set aside in the Appellate Court on an appeal in which Morey also participated. At the conclusion of these proceedings Morey's bonds were returned to him by the surety company.

On July 25, 1930 while the criminal proceedings in Livingston County were pending, Morey secured another note from Sullivan for \$1200.00. At the time of its execution the Sullivans signed a memorandum prepared by Morey stating that the note was given to Morey to reimburse him for the face amount of the Morrell note, trial expenses in the suit thereon, money advanced by Morey to pay taxes on property owned by the Sullivans and \$150.00 thereafter paid to the Sullivans. The latter contend that they signed this note





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and the memorandum under duress upon representations from Morey that he would withdraw from the pending criminal case and secure the return of his Federal bonds.

In March, 1941, Morey told the Sullivans that they would have to extend the maturity date of the \$3000.00 note or he would have judgment entered upon it. The Sullivans thereupon endorsed an extension agreement on the note to June 15, 1942. On April 13, 1942, a \$50.00 payment was credited on the \$1200.00 note by Morey. Sullivan claims that he directed Morey to apply this payment to another note of Sullivan's held by Morey but the latter denies this, stating that Sullivan directed him to credit the payment to the \$1200.00 note.

The Circuit Court of Macon County found that an attorney-client relationship existed between the parties and that Morey failed to establish that he dealt with fairness and equity with the Sullivans. It further found that Morey had failed to prove that the notes and mortgage in question were valid obligations of the Sullivans and in addition that the \$1200.00 note was barred by the Statute of Limitations. It therefore ordered the cancellation of the notes and mortgage.

It is clear that an attorney-client relationship existed between Morey and the Sullivans at the time the \$1200.00 note was executed. Because of this the burden of proof rested upon Morey to show that the consideration for the note was fair and adequate. *Ankrom vs. Doss*, 270 Ill. App. 464. We believe that Morey has fulfilled this requirement. Sullivan claims that the major portion of the alleged consideration for this note was the repayment of the loss sustained by Morey in connection with the





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Morrell note. The endorsement on that note provided:

"For value received we hereby transfer and assign all our right, title and interest in this note to \_\_\_\_\_ The Standard Light Co. by P. B. Sullivan." This, Sullivan contends is a qualified endorsement which does not include the usual warranties and he cites our decision in Ellsworth vs. Varney, 83 Ill. App. 94. That case was decided in 1898; in 1907 our Negotiable Instruments Act was passed, Section 31 of which (Ill. Rev. Stat. 1943, Chapter 98, Par. 51) provides in part; "The signature of the indorser, without additional words, is a sufficient indorsement and the addition of words of assignment or of guaranty shall not negative the additional effect of the signature as an indorsement unless otherwise expressly stated." Section 38 (Ill. Rev. Stat. 1943, Par. 58) provides: "A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words 'without recourse' or any words of similar import." Without deciding the question, we believe that in view of these provisions of the Statute, there is a question as to whether our decision in the Varney case now correctly states the law. It is sufficient to state here that a bona fide ground for dispute existed over the liability of Sullivan as an unqualified endorser and this disputed liability can properly be considered as part of the consideration for the \$1200.00 note. Adams vs. Crown Coal & Tow Co. 198 Ill. 445; Greer-Wilkinson Lumber Co. vs. Neeves, 184 Ill. App. 575; Smith vs. McLennan, 101 Ill. App. 196. The Sullivans also contend that they signed the note under duress. The

record however fails to sustain this charge. While Morey





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may have used pressure to obtain his end, that in itself does not constitute duress. Farmers National Bank of Princeton vs. Rosenkrans, 240 Ill. App. 230. Sullivan was a man of considerable business experience and especially aware of the sharp practices that often occur in the business world. We do not believe that any advantage was taken of him. The mere threat on Morey's part to withdraw from the defense of a criminal prosecution, and to withdraw the Federal Land Bank Bonds that he had furnished in order to obtain a bail bond for Sullivan, unless he was then secured or reimbursed for the loss that he had on the Morrell note and for money advanced to the Sullivans, is not as a matter of law the basis for duress so as to nullify a written promissory note. We therefore believe that the Circuit Court erred in finding that Morey failed to prove that the \$1200.00 note was supported by fair and adequate consideration.

The trial court also found that the \$1200.00 note was barred by the Statute of Limitations. It is implicit in this finding that the Court believed Sullivan's statement that he did not intend his fifty dollar payment of April 13, 1942 to be credited on this note. The evidence is conflicting on this point and since the chancellor's finding is not contrary to the weight of the evidence we believe that as far as the facts are concerned his finding in this respect must be sustained. We do not agree, however, that the Statute of Limitations should prevent Morey from collecting anything on his debt. A chancellor must always be guided by the maxim that he who seeks equity must do equity. The Sullivans, in their complaint, offered to make restitution to Morey of such amount as the Court should deem just. We believe they should be required





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to do so. The grafting of such a condition upon a decree cancelling evidence of an indebtedness is well within the power of the chancellor. DeWalsh vs. Braman, 160 Ill. 415.

The Circuit Court also found that an attorney-client relationship existed at the time the \$3000.00 note and mortgage was executed and that Morey had not sustained the resulting burden of proving that there was a fair and adequate consideration for them. We do not believe a determination of this issue to be important. In our judgment the only question is what actually was the consideration for the note and mortgage. Sullivan contends that these instruments were executed to indemnify Morey for any loss he might sustain by hypothecating his bonds with the surety company. He so testified and he is corroborated in this by the testimony of two of his employees who were present during certain conversations between Sullivan and Morey. Morey claims, on the contrary, that these instruments were to secure him for unpaid legal fees for services already performed and for fees to be incurred in the criminal proceedings in Livingston County. Regardless of where the burden of proof lay, we believe that it was incumbent upon Morey to produce some evidence in addition to his own statement to meet the testimony of Sullivan and his witnesses. This he could have done by showing that the face amount of the note bore some relation to the value of the services performed by him. The record is barren of any evidence of this character except for statements by Morey of the results obtained by his efforts. In fact, Morey, on cross examination evaded answering what amounts he had charged Sullivan for his services. Under these circumstances we think the weight of the evidence supports Sullivan's





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contention and that upon the return of Morey's bonds to him, the consideration for the \$3,000.00 note and mortgage failed. We believe the chancellor correctly ordered both instruments surrendered and cancelled.

The decree of the Circuit Court of Macon County is therefore reversed and the cause remanded to that court with directions to make an accounting between the parties on the twelve hundred dollar note and to find the sum due the defendant thereon. The Court is further directed to modify the decree in this cause to provide that the three thousand dollar note and mortgage shall be surrendered and cancelled upon the payment of the sum found due on said twelve hundred dollar note.

DECREE REVERSED. CAUSE REMANDED WITH DIRECTIONS.





43416

PETER CHAPRALIS, et al.,  
Appellants,

v.

CITY OF CHICAGO, a Municipal  
Corporation,  
Appellee.

APPEAL FROM  
SUPERIOR COURT,  
COOK COUNTY.

326 I.A. 554

PRESIDING  
MR./JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The facts in this case are not disputed. February 1, 1921, the City of Chicago filed a condemnation petition in the Circuit Court of Cook County, Case No. B-71144, to acquire property for the purpose of widening North Ashland Avenue from Lake Street to Irving Park Boulevard, in conformity with the provisions of the Local Improvement Act of 1897. The property to be acquired was owned by plaintiffs in this case and other persons made defendants. Awards were rendered in favor of each defendant entitled, and on July 26, 1927, the City of Chicago caused a final and unconditional judgment on each award to be entered in favor of each of the property owners. Plaintiffs in this litigation are defendants named in the condemnation suit. The amounts of judgments respectively entered in their favor appear in appropriate pages of the record. The record also shows that the principal amounts of these judgments, as listed, were paid by the City of Chicago during the years 1929, 1930 and 1931.

The procedure used in paying the judgments was, the City of Chicago caused a warrant to issue for the amount of the judgment, the warrant providing that it was issued "for the amount of compensation awarded that part of (reciting legal description),



PETER CHARLIS, et al.,  
Defendants,

v.

CITY OF CHICAGO, a Municipal  
Corporation,  
Appellee.

APPEAL FROM  
CIRCUIT COURT,  
COOK COUNTY.

92614-554

MR. JUSTICE BREWER PRESIDING  
THE COURT OF THE CITY OF CHICAGO.

The facts in this case are not disputed. February 1, 1921, the City of Chicago filed a condemnation petition in the Circuit Court of Cook County, Case No. 1-7114, to acquire property for the purpose of widening North Ashland Avenue from Lake Street to Irving Park Boulevard, in conformity with the provision of the Local Improvement Act of 1917. The property to be acquired was owned by plaintiffs in this case and other persons made defendants. Awards were rendered in favor of each defendant entitled, and on July 26, 1927, the City of Chicago caused a final and unconditional judgment on each award to be entered in favor of each of the property owners. Plaintiffs in this litigation are defendants named in the condemnation petition. The amounts of judgments respectively entered in their favor appear in appropriate pages of the record. The record also shows that the principal amounts of these judgments, as listed, were paid by the City of Chicago during the years 1924, 1925 and 1926. The procedure used in paying the judgments was, the City of Chicago caused a warrant to issue for the amount of the judgment, the warrant providing that it was issued "for the amount of compensation awarded that part of (reciting local legislation),

2.

said land having been condemned for the opening and widening of North Ashland Avenue from Irving Park Boulevard to West Lake Street, being in full payment for said condemned land and in full of all claims for damages to same by reason of said proceedings". On the back of this voucher was a receipt signed by the property owner or his agent, similar to Exhibits 3 and 5 which appear in the record reciting: "Received of the City of Chicago in full payment of the within account". In payment of some of the judgments this form of voucher was used: "For balance of compensation awarded that part of (legal description), said land having been condemned for opening and widening North Ashland Avenue between Irving Park Boulevard and West Lake Street, being in full payment for said condemned land and in full of all claims for damages to same by reason of said proceedings". On the back of this voucher appears: "Received of the City of Chicago full payment of the within account". This voucher was signed either by the property owner or his agent, as appears from exhibits in the record. On the face of each voucher were the words: "The amount of this voucher is in accordance with the judgment of the court, and funds are available in this warrant to pay this voucher".

When the voucher had been issued and receipted by the property owner or his agent, the City of Chicago issued its check for the amount of the voucher. The check in each and every instance was made payable to the order of the property owner, as shown by exhibits in evidence. The back of each check bears the endorsement of the property owner, who deposited the same and received the proceeds, as appears by exhibits in evidence. Some plaintiffs acted through agents in securing the payment of their awards. In such instances the plaintiff executed a Power of Attorney with authority "to receive, collect



and land having been condemned for the opening and widening of North Ashland Avenue from Irving Park Boulevard to West Lake Street, being in full payment for said condemned land and in full of all claims for damages to same by reason of said proceedings. On the back of this voucher was a receipt signed by the property owner or his agent, attested to exhibits 3 and 4 which appear in the record reciting: "Received of the City of Chicago in full payment of the within account." In payment of some of the judgments this form of voucher was used: "For balance of compensation awarded that part of (legal description), said land having been condemned for opening and widening North Ashland Avenue between Irving Park Boulevard and West Lake Street, being in full payment for said condemned land and in full of all claims for damages to same by reason of said proceedings." On the back of this voucher appears: "Received of the City of Chicago in full payment of the within account." This voucher was signed either by the property owner or his agent, as appears from exhibits in the record. On the face of each voucher were the words: "The amount of this voucher is in accordance with the judgment of the court, and funds are available in this warrant to pay this voucher." Then the voucher had been issued and accepted by the property owner or his agent, the City of Chicago issued the check for the amount of the voucher. The check is each and every instance was made payable to the order of the property owner, as shown by exhibits in evidence. The back of each check bears the endorsement of the property owner, who deposited the same and received the proceeds, as appears by exhibits in evidence. Some plaintiffs noted through agents in securing the payment of their awards. In such instances the plaintiff executed a power of Attorney with authority "to receive, collect

3.

and receipt for all sums of money, which are or shall become due, owing and belonging to me by the City of Chicago, upon or growing out of widening Ashland and my said attorney is hereby fully authorized and empowered to do and perform all necessary acts and to sign all necessary papers for the said receipt and collection \* \* \*," as per exhibits.

September 9, 1938, plaintiffs brought this action, alleging that they had applied the above payments made by the City of Chicago first to the payment of interest and the balance to the payment of principal, and that by reason thereof they were suing for the balance of principal still due under the condemnation award, and interest from the date of partial payment.

The City of Chicago filed its motion to strike supported by affidavit and exhibits, alleging that the payments were made and accepted in full of the condemnation judgments and not upon the payment of interest as evidenced by the receipts of plaintiffs. It is also alleged that it never made any payments on account of interest or promised to pay interest.

Plaintiffs filed an amendment to their amended complaint in which they state they believe the exhibits of the defendants (the vouchers, checks and receipts of the plaintiffs or their agents) "to be true copies of the respective documents signed by the respective plaintiffs" or "by the agent of the respective plaintiffs."

The City renewed its motion to dismiss the cause of action. In support of this motion the City submitted the affidavit of George I. Keefe.

The cause was heard on the motion of the City to withdraw its pleading and dismiss the cause for the reason "that said cause includes the claims of various plaintiffs alleging that



and receipt for all sums of money, which are or shall become due,

owing and belonging to me by the City of Chicago, or on  
 account of widening, and by said Attorney is hereby  
 fully authorized and empowered to do and perform all necessary  
 acts and to sign all necessary papers for the said receipt and  
 collection " " " " as an exhibit.

September 2, 1908, Plaintiff's receipt this action,

alleging that they had applied the above payments made by the  
 City of Chicago first to the payment of interest and the  
 balance to the payment of principal, and that by reason thereof  
 they were suing for the balance of principal still due under  
 the contract, and interest from the date of partial  
 payment.

The City of Chicago filed the motion to strike supported  
 by affidavit and exhibits, alleging that the payments were made  
 and accepted in full of the consideration, interest and not upon  
 the payment of interest as evidenced by the receipts of Plaintiff.  
 It is also alleged that it never made any payments on account of  
 interest or promised to pay interest.

Plaintiff filed an amendment to their amended complaint  
 in which they state they believe the exhibits of the defendant  
 (the vouchers, checks and receipts of the Plaintiff or their  
 agents) "to be true copies of the respective documents signed  
 by the respective Plaintiff" or "by the agent of the respective  
 Plaintiff."

The City renewed its motion to dismiss the cause of  
 action. In support of this motion the City submitted the affi-  
 davit of George I. Kelly.

The cause was heard on the motion of the City to dismiss  
 its pleading, and during the course for the reason that said  
 cause includes the claims of various Plaintiff's alleging that

4.

there is due to each individually a certain sum or sums of money as interest on condemnation awards referred to in the amended complaint herein; that the alleged causes of action as set forth in the amended complaint did not accrue to the plaintiffs within the time limited by law for the commencement of an action". The motion was allowed and the cause dismissed.

The appeal was taken to the Supreme court but that court transferred the case to this court. No additional briefs were filed in this court. The parties, however, were heard on oral argument. The proceeding in the trial court was under Section 48 of the Civil Practice Act. The defenses relied on by the defendant City are similar to those held to be good and sufficient under substantially similar circumstances in Cohen v. City of Chicago, 377 Ill. 221, decided June 13, 1941. The Supreme court in its opinion there, at page 235, said of similar documents:

"It is our view that the language of these vouchers and the deeds and, particularly, the receipts endorsed upon the back of the vouchers, clearly indicate that it was the intention of all parties that the payments made were intended, and accepted, as full payment and liquidation of the judgments. On the face of the vouchers it clearly appears that the payments were for the balance of compensation due, which was the balance of the judgment, in each instance. The receipts on the back of the vouchers are, to the effect, that the payee, named on the face of the vouchers, and by whom the receipt is signed, has received full payment for the account described in the voucher. The language of the deeds, made simultaneously with the delivery of the vouchers and checks, definitely supports this conclusion. In our view, the record shows conclusively that it was the intention of all parties that the delivery of the vouchers and checks was in full satisfaction of the amounts of compensation, as fixed by the judgments."

The Cohen case had not been decided when the instant suits were begun. We assume if it had these actions would not have been brought.



there is due to each individually a certain sum or sums of money as interest on compensation which is referred to in the amended complaint herein; that the alleged causes of action as set forth in the amended complaint did not accrue to the plaintiff within the time limited by law for the commencement of an action. The action as allowed and the cause dismissed. The appeal is taken to the Supreme court but that court transferred the case to this court. In addition, which were filed in this court. The parties, however, were heard on oral argument. The proceeding in the trial court was under Section 48 of the Civil Practice Act. The defense relied on by the defendant City are similar to those held to be good and sufficient under substantially similar circumstances in Dolan v. City of Chicago, 377 Ill. 2d, decided June 18, 1961. The Supreme court in its opinion there, at page 235, said of similar

documents:

"It is our view that the language of the vouchers and the deeds and, particularly, the receipts endorsed upon the back of the vouchers, clearly indicate that it was the intention of all parties that the payments were intended, and accepted, as full payment and liquidation of the judgment. On the face of the vouchers it clearly appears that the payments were for the balance of compensation due, which was the balance of the judgment, in each instance. The receipts on the back of the vouchers are, to the effect, that the payee, named on the face of the vouchers, and by whom the receipt is signed, has received full payment for the amount described in the voucher. The language of the deeds, made simultaneously with the delivery of the vouchers and checks, definitely supports this conclusion. In our view, the receipt shows conclusively that it was the intention of all parties that the delivery of the vouchers and checks was in full satisfaction of the amount of compensation, as fixed by the judgment."

The Coben case had not been decided when the instant suits were begun. We assume if it had these suits would not have been brought.

5.

Plaintiffs argue here their right to recover costs in the trial court. We do not doubt it. However, their pleading does not allege any such costs are unpaid.

Complaint is made that plaintiffs should have had the right to reply to the City's plea of the Statute of Limitations. If they wished to do so, they could have done so under Section 48 of the Civil Practice Act. Plaintiffs did not avail themselves of that privilege. Moreover see Blakeslee's Warehouses v. City of Chicago, 369 Ill. 480.

The judgment of the trial court will be affirmed.

AFFIRMED.

Niemeyer, J., and O'Connor, J., concur.



Plaintiffs have their right to recover under the  
the trial court. We do not doubt it. However, their pleading does  
not allege any such facts and are unavailing.

Complaint is made that plaintiffs should have had the  
right to reply to the City's case at the statute of limitations.  
If they wished to do so, they could have done so under Section  
48 of the Civil Practice Act. Plaintiffs did not avail them-  
selves of that privilege. Moreover see Blanchard v. City of Chicago, 308 Ill. 450.

The judgment of the trial court will be affirmed.

APPROVED:

Wise, J., and O'Connor, J., concur.

43215

WERNER W. HUYLER,

Appellee,

v.

CITY OF CHICAGO, a Municipal  
Corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

326 I.A. 555 (20)

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In a trial before the court and a jury of an action filed in the Circuit Court of Cook County by Werner W. Huyler against the City of Chicago to recover damages for personal injuries sustained when the car he was driving collided with a safety island and light post thereon at Ridge Avenue and Clark Street, the jury returned a verdict for plaintiff in the sum of \$100,000. Before the trial, the complaint was amended to show that Huyler had been adjudged mentally ill and incompetent in a County Court proceeding and Edward M. Herman was appointed conservator of his estate by the Probate Court. Defendant's motions for a directed verdict, for judgment notwithstanding the verdict, for a new trial and in arrest of judgment were overruled, and judgment was entered on the verdict. Defendant appeals. For convenience we will refer to Werner W. Huyler as plaintiff. Plaintiff's theory of the case is that defendant violated its duty to maintain its streets in a reasonably safe condition, by not exercising ordinary care to sufficiently warn traffic of the danger of an island and pole in the roadway; and that numerous prior accidents had occurred by reason of vehicles colliding with the island and pole, which tended to show that the common cause was unsafe and dangerous, and raised a presumption of the City's knowledge of such condition. Defendant's theory of the case is that the safety island and pole were constructed properly, were lighted adequately, so that they did not constitute a dangerous



WILLIAM W. TUTTLE,

Defendant,

v.

CITY OF CHICAGO, a Municipal Corporation,

Plaintiff.

38614.055

THE FOLLOWING JUDGMENT WAS ENTERED BY THE COURT:

In a trial before the court and a jury of the county

filed in the Circuit Court of Cook County by William W. Tuttle

against the City of Chicago to recover damages for personal injuries

sustained when the car he was driving collided with a safety island

and light post known as "Island Avenue and Clark Street," the jury

returned a verdict for plaintiff in the sum of \$100,000. Before

the trial, the complaint was amended to show that Tuttle had been

adjudged mentally ill and incompetent in a County Court proceeding

and Edward A. Herman was appointed conservator of his estate by the

Probate Court. Defendant's motions for a directed verdict, for

judgment notwithstanding the verdict, for a new trial and in arrest

of judgment were overruled, and judgment was entered on the verdict.

Defendant appeals. For convenience we will refer to Herman as

Tuttle as plaintiff. Plaintiff's theory of the case is that

defendant violated its duty to maintain the streets in a reasonably

safe condition, by not exercising ordinary care to sufficiently warn

traffic of the danger of an island and pole in the roadway; and that

numerous prior accidents had occurred in reason of vehicles colliding

with the island and pole, which tended to show that the common

cause was unsafe and dangerous, and raised a presumption of the

City's knowledge of such condition. Defendant's theory of the case

is that the safety island and pole were constructed improperly, were

ill-placed respectively, so that they did not constitute a dangerous

condition for travel or traffic; and that it was not guilty of any negligence causing the plaintiff's injuries, but that his injuries were due to his failure to exercise due care and caution for his safety.

The intersection of Ridge Avenue and Clark Street is an unusual one. Clark Street runs north and south and is 94 feet from curb to curb. There are street car tracks on this street, the distance being 39 feet, 7 inches to the car tracks from each curb, and the tracks occupying 14 feet of the street. Ridge Avenue, a through street, runs northwest and southeast. Ridge Avenue, east of Clark Street, is 44 feet wide, while west of Clark Street it is 60 feet wide. Ridge Avenue, going north, west of Clark Street, is at a changed angle from east of Clark Street, turning south about 5 degrees from the 40 degree angle formed by Ridge Avenue crossing Clark Street. This makes a slight kink in Ridge Avenue east and west of Clark Street. West of Clark Street, Ridge Avenue angles slightly to the west. On the west side of Clark Street, in the center of Ridge Avenue, is the safety island, a concrete block 5 inches high. A light pole rises from the center of the island, 15 feet, 4 inches from the southeast edge. It is  $30\frac{1}{2}$  feet high. At 22 feet above street level is a bracket burning two 10,000 lumen lamps with a porcelain enamel reflector over each to direct the light down and out. Each light is the equivalent of a 500 watt lamp on a 120 volt circuit. At each corner of the intersection are city light poles bearing the customary street lights of 10,000 lumen lamps with porcelain enamel reflectors above them. In addition to these lights at the corners of the intersection, on the west curb of Clark Street 137 feet north of the safety island is a lamp, northwest on Ridge Avenue there are three such lamps within 250 feet, one on the south side of Ridge Avenue 97 feet from the post, one on the north side, 175 feet from the post, and one on the south side, 250 feet



condition for travel or traffic; and that it was not guilty of any negligence causing the plaintiff's injuries, but that his injuries were due to his failure to exercise due care and caution for his safety.

The intersection of Ridge Avenue and Clark Street is an unusual one. Clark Street runs north and south and is 36 feet from curb to curb. There are street car tracks on this street, the distance being 36 feet, 7 inches on the one side, from each curb, and the tracks occupying 14 feet of the street. Ridge Avenue, a through street, runs north and south. Ridge Avenue, west of Clark Street, is 44 feet wide, while east of Clark Street it is 60 feet wide. Ridge Avenue, going north, west of Clark Street, is at a changed angle from east of Clark Street, crossing south about 6 degrees from the 45 degree angle formed by Ridge Avenue crossing Clark Street. This makes a slight kink in Ridge Avenue west and west of Clark Street. West of Clark Street, Ridge Avenue angles slightly to the west. On the west side of Clark Street, in the center of Ridge Avenue, is the safety island, a concrete block 5 inches high. A light pole stands near the corner of the island, 10 feet, 4 inches from the southeast side, it is 30 feet high, at 22 feet above street level is a bracket bearing two 10,000 lumen lamps with a porcelain enamel reflector over each to direct the light down and out. Each light is the equivalent of a 600 watt lamp on a 120 volt circuit. At each corner of the intersection and city light poles bearing the customary street lights of 10,000 lumen lamps with porcelain enamel reflectors above them. In addition to these lights at the corners of the intersection, on the west curb of Clark Street 127 feet north of the safety island is a lamp, northwest on Ridge Avenue there are three such lamps within 500 feet, one on the south side of Ridge Avenue 77 feet from the curb, one on the north side, 175 feet from the curb, and one on the south side, 250 feet

from the post. On the east side of Clark Street, on the east curb there is a lamp south of the north property line of North Thorndale Avenue, 125 feet from the pole on the island. Thorndale Avenue, an east and west street, runs into Clark Street from the east a short distance north of Ridge Boulevard, but does not intersect Clark Street. The light on the northeast corner of Clark Street and Ridge Avenue is 138 feet from the post on the island, and a light at the southwest corner of Clark Street and Ridge Avenue is 200 feet from the post. On the south side of Ridge Avenue, 22 feet from the east property line of Clark Street, is a light which is 225 feet from the post, and on the north side of Ridge Avenue 270 feet from the post is another light, in addition to all of which there are more lights further down the street. South from the pole there are two lights on Clark Street, one on the southwest corner of the intersection and one at the southeast corner, and other lights further away. All of these lights are 10,000 lumen lamps, each the equivalent of a 500 watt lamp on a 120 volt circuit, the largest size street lamp in defendant's lighting system.

At the time of the occurrence, Monday, March 16, 1942, plaintiff was 44 years of age, married and the father of six children ranging in age from 2½ years to 16 years. He lived with his family in a home in Wilmette. On Sunday afternoon the Huyler family was invited to attend a 50th wedding anniversary celebration in honor of Mr. and Mrs. Thomas Stafford, the uncle and aunt of plaintiff's wife. He left his home accompanied by his wife and two daughters in his four door Chevrolet sedan automobile, which he was driving. He first drove to 6033 North Mozart Street in Chicago, where he called for Mrs. Colette Stafford, his sister-in-law. They arrived there about 3:00 p.m. and left a few minutes later. He then drove to 2000 Lincoln Park West, where Mr. and Mrs. John W. Stafford, his father-in-law and mother-in-law, were waiting to be transported to the party.



from the east, on the east side of Clark Street, on the west side  
there is a lamp south of the north property line of North Franklin  
avenue, 125 feet from the pole on the island, Franklin Avenue,

on east and west street, from into Clark Street from the west a  
short distance north of Clark Street, but does not intersect Clark  
Street. The light on the northeast corner of Clark Street and High  
avenue is 125 feet from the pole on the island, and a light on the  
southeast corner of Clark Street and High Avenue is 20 feet from  
the pole. On the east side of Clark Avenue, 50 feet from the east  
property line of Clark Street, is a lamp which is 225 feet from the  
pole, and on the north side of High Avenue 270 feet from the pole is

another light, in addition to all of which there are more lights  
further down the street. South from the pole there are two lights on  
Clark Street, one on the southwest corner of the intersection and one  
at the southeast corner, and other lights further away. All of these  
lights are 10,000 lumen lamps, each an equivalent of a 100 watt lamp  
on a 120 volt circuit, the largest size street lamp in operation.

Lighting system.

At the time of the investigation, Monday, March 10, 1924, plain-  
clothes men of the Chicago Police Department, who were in the  
clothing in the last 24 years to 12 years. He lives with his family  
in a home in Illinois. On Monday afternoon the writer finally was  
invited to attend a 100th birthday anniversary celebration in honor  
of Mr. and Mrs. Thomas Gafford, the whole and part of Gafford's  
wife. He left his home accompanied by his wife and two daughters in  
his four door Chevrolet with a automobile, which he was driving. He  
first drove to 6005 West Belmont Street in Chicago, where he called  
for Mrs. Gafford's mother, the sister-in-law. They arrived there  
about 2:00 p.m. and left a few minutes later. He then drove to 2000  
Lincoln Park West, where Mr. and Mrs. Gafford, his sister-in-  
law and mother-in-law, were waiting to be accompanied to the party.

The celebration was to be held at St. Columkille Day Nursery, 527 North Paulina Street, Chicago. The group arrived there about 4:00 p.m. The party was attended by many associated with the nursery, the family and old friends. There were no liquors served to any of the guests and plaintiff had none. The party lasted no longer than 4 hours, in deference to the age of the celebrants. The Huyler group left at around 8:00 p.m. They first went to the Stafford residence at 2000 Lincoln Park West, where they visited the new apartment into which the Staffords had but recently moved. They stayed about a half hour. They then went to plaintiff's home in Wilmette, arriving there about 10:00 p.m. Plaintiff's wife served refreshments consisting of coffee and cake about 11:00 p.m. While there, it began to rain and the guests stayed on in the hope that the downpour would cease. At about 12:30 a.m. they felt that the rain had sufficiently abated for them to leave, and Mrs. Colette Stafford and Mr. and Mrs. John Stafford and plaintiff went into the automobile. Plaintiff's wife and daughters remained at home with the rest of the children. The car was equipped with double windshield wipers, which were properly operating. The car was in good order. It was raining hard and it was very dark and plaintiff drove at a low rate of speed. He first drove Mrs. Colette Stafford to her home and then drove Mr. and Mrs. John Stafford to their home. Plaintiff was then alone and he turned his car around for the homeward journey.

At a time variously set by the witnesses at 2:00 a.m. and 2:45 a.m. Monday, plaintiff was driving in a northwesterly direction on Ridge Avenue at its intersection with Clark Street. In his deposition, which was received in evidence at the trial, he testified that a light rain was falling and that it had rained very hard prior to midnight; that there were no street lights burning on Ridge Avenue or on Clark Street as he approached; that there was no light on the safety island just west of Clark Street in the center of Ridge Avenue,



The celebration was to be held at St. Catherine's Day, Sunday, May  
North Wall Street, London. The group arrived there about 11:00 a.m.  
The party was attended by many well-known and old friends, the family  
and old friends. There were no flowers sent to any of the guests  
and a list of names. The party lasted no longer than a hour  
in reference to the age of the celebration. The English group left  
at around 1:00 p.m. They first went to the station residence at  
200 Lincoln Park West, where they stayed for the night. They  
which the Statute had not properly noted. They stayed about a half  
hour. They then went to the Statute's home in Lincoln, arriving there  
about 10:00 a.m. Statute's wife served refreshments consisting of  
coffee and cake about 11:00 a.m. While there, it seems to have been  
the guests stayed on in the hope that the Statute would return. At  
about 12:30 a.m. they left the main hall and returned to their  
them to leave, and Mrs. Statute returned to her home. John Statute  
and Statute went into the Statute's wife and daughter's  
remained at home with the rest of the children. The new and original  
with double windows, which were properly covered. The  
car was in good order. It was white, and it was very clean and  
Statute drove at a low rate of speed. The first drive was to  
Statute to her home and then to her home. John Statute  
their home. Statute and then alone and he turned the car around  
for the home journey.  
At a time when the Statute was at 11:00 a.m. and  
1:00 a.m. Statute was driving in a motorcar, and  
on the avenue at the intersection with Park Street. In his  
deposition, which was received in evidence at the trial, he testified  
that a light rain was falling and that it had rained very hard since  
to midnight. That there were no street lights burning on either side  
on or near the street as he approached; that there was no light on the  
street lamps just west of Park Street in the center of Park Street.

or on the pole on the island; that the lights were out; that he was going 20 or 25 miles an hour; that his windshield wipers were working; that his headlights were burning; that he could see 200 or 300 feet ahead; that approaching Clark Street there is a white line in the center of Ridge Avenue that swings to the right of the safety island; that if one follows the line he will hit the island; that he saw the island when he was 5 or 10 feet away and collided with it, straddling the island and striking the post. His wife testified that they had driven over the intersection 10 or 15 times before the occurrence, both day and night. There was no other traffic at the time. There were stop and go traffic lights at the intersection. The traffic light for his direction of travel was green and he drove across Clark Street with the wheels of his car one foot north of the center line. The car straddled the concrete island and smashed into the post. The police were notified within a few minutes after the collision and arrived a short time later. Plaintiff was unconscious. The police lifted him out of the car, placing a temporary splint upon his right leg, and drove him to the Edgewater Hospital, located in the vicinity. At the Edgewater Hospital he was taken to the emergency room and was first attended by Dr. Blou, an interne. He remained in that room from about 2:45 to 5:20 a.m. He was semi-conscious. Dr. McGarry, the family physician, arrived at about 3:00 a.m., sutured the lacerations on his face and neck and applied a metal splint to his right ankle. His tongue was thick, swollen and discolored with some bleeding. The emergency nurse assisted in the first examination and remained until he was removed to a private room. It was part of her duties to note whether the injured person had imbibed intoxicating liquor. She did not smell any such odor on his breath. Witnesses for plaintiff testified he had no alcoholic drink during any of the time he was with them on the Sunday afternoon and evening before the mishap.



on an pole on the island; that the lights were not; that he was going 10 or 15 miles an hour; that his headlights were broken; that his headlights were broken; that he could see 100 or 200 feet ahead; that approaching Clark that there is a white line in the center of Ridge Avenue and owing to the light of the light; that if one follows the line he will hit the island; that he saw the island when he was 5 or 10 feet away and collided with it, striking the island and striking the post. His wife testified that they had driven over the intersection 10 or 15 times before the occurrence, both day and night. There was no other traffic at the time. There were stop and go traffic lights at the intersection. The traffic light for his direction of travel was green and he drove across Clark Street with the wheels of his car and front end of the center line. The car struck the concrete island and crossed into the post. The police were notified within a few minutes after the collision and arrived a short time later. Plaintiff was unconscious. The police lifted him out of the car, of which a lawyer called upon his right leg, and drove him to the Spaulding Hospital, located in the vicinity. At the Spaulding Hospital he was taken to the emergency room and was first attended by W. Shaw, an internist. He remained in that room from about 2:45 to 3:10 p.m. He had semi-conscious, etc. He was, the family physician, arrived at about 3:00 p.m., called the instructions on his face and back and applied a bandage to his right ankle. His tongue was thick, swollen and adhered with some bleeding. The emergency nurse assisted in the first examination and remained until he was removed to a private room. It was part of her duties to note whether the injured person had landed anywhere. He did not recall any pain on his breast, abdomen or plaintiff testified he had no alcoholic drink during any of the time he was with them on the Sunday afternoon and evening before the accident.

Louis Jessen, who worked in the oil station at the southwest corner of the intersection, testified that he arrived at the scene of the occurrence immediately after the collision of plaintiff's car with the light post and smelled no alcohol on his breath. The two policemen first on the scene who removed him from his automobile, testified that there was an odor of liquor on plaintiff's breath and that he told them he had a couple of glasses of beer around midnight. The officer who drove plaintiff to the hospital in the patrol wagon smelled liquor on his breath and heard him tell one of the officers he had some beer. Two officers from the Accident Prevention Squad, who took a statement while he was in the emergency room at the hospital, testified that they could smell a strong odor of intoxicating liquor on his breath, that he stated he had drinks, and that his statement was put in a written accident statement which he signed. All five officers testified he conversed with them after the accident.

In addition to the head injury, two bones of the right ankle had been fractured three times, leaving five broken surfaces. This injury is known as a tri-malleolar fracture. Dr. Peter Bassoe, a specialist in nervous and mental diseases, was called in for consultation on March 19, 1942. He recommended that an exploratory operation be made of the brain. Dr. Adrien VerBruggen, a specialist in brain surgery, examined plaintiff at the Edgewater Hospital at Dr. McGarry's request. He recommended an immediate operation be performed at St. Francis Hospital. Later that same night Dr. VerBruggen operated by making an incision in the skull and boring a hole the size of a dollar in the left side thereof. A fine needle was inserted through the brain to a depth of about 3 to 5 centimeters and about  $\frac{1}{2}$  ounce of blood was withdrawn. The brain then collapsed and started to pulsate. Plaintiff first recognized his wife 7 or 8 days after the operation, but he did not recognize pictures of 5 of



Paul Jensen, who worked in the oil section at the industrial company of the intersection, testified that he arrived at the scene of the occurrence immediately after the collision of plaintiff's car with the light post and walked on his hands and knees to the police station first on the scene and then on his hands and knees, testified that there was no sign of injury on plaintiff's person and that he told them he had a couple of bruises of his arm around midnight. The officer who drove plaintiff to the hospital in the patrol wagon walked along on his hands and knees and fell on the ground, who took a statement while he was in the emergency room at the hospital, testified that they could tell a strong odor of intoxicating liquor on his breath, that he stated he had a drink, and that his statement was not in a written statement which he signed. All five officers testified he conversed with them after the accident.

In addition to the head injury, two bones of the right arm had been fractured three times, leaving five broken unfractured. This injury is known as a poly-fractured fracture. Dr. Victor Hansen, a specialist in nervous and mental diseases, was called in for consultation on March 12, 1942. He recommended that an exploratory operation be made of the brain. Dr. Victor Hansen, a specialist in brain surgery, examined plaintiff at the Metropolitan Hospital at Dr. Hansen's request. He recommended an immediate operation be performed at Dr. Hansen's hospital. Later that same night Dr. Victor Hansen operated on plaintiff by making an incision in the skull and boring a hole the size of a dollar in the left side thereof. A fine needle was inserted through the brain to a depth of about 5 to 6 centimeters and about 2 ounces of blood was withdrawn. The brain then collapsed and started to bulge. Plaintiff first recognized his wife V on 3 days after the operation, but he did not recognize anyone of his

his 6 children. He remained in the hospital for 19 days and was then taken to his home where he remained in bed until the latter part of May, 1942. The cast on his right leg was then removed and he moved about the house on crutches. During the first week in July he was taken to Pittsburgh to visit his sister, but upon his return he went to Waukesha, Wisconsin to obtain therapy on his leg. For 9 years prior to March 16, 1942 he was employed as sales representative for the Standard Pressed Steel Company, assigned to its Chicago office. It was necessary that he have a thorough engineering knowledge of all shop operations and he had gathered this from schooling and his years of experience in the field. He was a sales engineer, rather than a salesman. The officers of his company had arranged to name him as a district manager for a southwest territory, to start on January 1, 1943. That did not occur because of the injury suffered by him. He earned \$11,861.56 for the year 1941 and \$17,810.13 for 1942. He had no source of income other than that received from his employer. As a district manager his earnings would have been substantially increased over those received by him as a sales representative. He first returned to his desk at the Standard Pressed Steel Company in October, 1942, but it was not until after Christmas of that year that he stayed at work for a full day. He continued there until April of 1943. During this entire period he imagined people were "making fun of him". He had difficulty in remembering names, faces and things that had once been very familiar to him. In May of 1943 it was suggested by his employer that he try to work in St. Louis with the hope that the change of environment would improve his condition. He returned of his own volition within one day, stating that he wanted to commit suicide and was fearful of that. He was placed in Kenilworth Sanitarium, where he remained for 4 weeks and was released about the first of June. At that time he received a letter from his employer terminating his employment. He was discharged because he was incapable of performing



his 8 children. He remained in the hospital for 12 days and was then taken to his home where he remained in bed until the latter part of May, 1942. The cause of the injury was then removed and he moved about the house as usual. During the time when in July he was taken to Birmingham to visit his sister, but when his return he went to Birmingham, intending to obtain therapy on his leg. For 2 years prior to March 12, 1942 he was employed as sales representative for the Standard Pressed Steel Company, assigned to the Chicago office. It was necessary that he have a thorough engineering knowledge of all shop operations and he had gathered this from working with the years of experience in the field. He was a sales engineer, rather than a salesman. The officers of the company had arranged to send him to electric manager for a southern territory, to start on January 1, 1942. That day not occur because of the injury suffered by him. He earned \$11,861.32 for the year 1941 and \$17,810.12 for 1942. He had no source of income other than that received from his employer. As electric manager his earnings would have been substantially increased over those received by him as a sales representative. He first returned to his work at the Standard Pressed Steel Company in October, 1942, but it was not until after Christmas of that year that he started to work for a full day. He continued there until April of 1943. During this entire period he imagined people were "making fun of him". He had difficulty in remembering names, faces and things that had once been very familiar to him. In May of 1943 it was suggested by his employer that he try to work in St. Louis with the News Press and change of environment would improve his condition. He returned to his own volition within one day, stating that he wanted to consult suicide and was fearful of that. He was placed in Bellevue Hospital where he remained for a week and was released about the first of June. At that time he received a letter from his employer terminating his employment. He was discharged because he was incapable of performing

any duties in the aid of the business of his employer. In January, 1944 he threatened his wife and said to her that he did not want to go on living and that he would take her with him. A week or so later he told his wife to prepare for a shock. She then spoke to Dr. McGarry, who recommended that he be taken to the Psychopathic Hospital, which was done. In February, 1944 an order was entered in the County Court, based upon medical opinion, finding plaintiff to be of unsound mind and committing him to the Chicago State Hospital at Dunning.

Defendant maintains that as a matter of law, it was not guilty of negligence in constructing and maintaining the safety island and light pole. It is the duty of a municipality to exercise reasonable care and diligence to keep and maintain its streets in a reasonably safe condition for the use of the public traveling thereon. Plaintiff urges that the roadway was dangerous because of the manner in which the island was maintained. The island was completed by defendant on January 28, 1941. A safety island is a legalized obstruction in the city streets. The city authorities, in the exercise of their official functions, are vested with the authority to devise and construct needed and necessary traffic guides and controls by virtue of the city's jurisdiction and control of the streets. We agree with plaintiff that it became relevant to determine from all the surrounding circumstances whether the city was negligent in the maintenance of the roadway after it placed the obstruction upon it. Louis Jessen, who was employed from September, 1941 to February, 1943 at the gas station located at the southwest corner of the intersection, testified that there were no indications on the street or on the post to denote the presence of the post; that the lights on the island do not shine very good; and that the pole blended with an apartment building back in the block. On cross-examination, he admitted he could see the pole from his station the night of the occurrence. Lyle Brown was also employed at the service station located at the southwest corner of



any duties in the line of the business of his employer. In January, 1944 he threatened his wife and said to her that he did not want to go on living and that he would take her with him. A week or so later he told his wife to prepare for a shock. The then arose to the bathroom and recommended that he be taken to the Psychopathic Hospital, which was done. In February, 1944 an order was entered in the County Court, based upon medical opinion, finding plaintiff to be of unsound mind and committing him to the Chicago State Hospital at Joliet.

Defendant maintains that as a matter of fact, it was not duty of negligence in conducting and maintaining the safety island and light rail. It is the duty of a municipality to exercise reasonable care and diligence to keep and maintain its streets in a reasonably safe condition for the use of the public traveling thereon. Plaintiff urges that the highway was dangerous because of the manner in which the island was constructed. The island was completed by defendant on January 28, 1941. A safety island is a legalized obstruction in the city streets. The city authorities, in the exercise of their official functions, are vested with the authority to devise and construct needed and necessary traffic guides and controls by signs or other city's jurisdiction and control of the streets. He agrees with plaintiff that it became relevant to determine from all the surrounding circumstances whether the city was negligent in the maintenance of the roadway after it placed the obstruction upon it. In this regard, the one employee from September, 1941 to February, 1942 at the gas station located at the southeast corner of the intersection, testified that there were no indications on the street or on the post to indicate the presence of the post; that the light on the island did not shine very good; and that the pole blended with an apartment building back in the block. On cross-examination, he admitted he could see the pole from his station the night of the occurrence. The driver was also employed at the service station located at the southeast corner of

the intersection. He worked there in February and March, 1941. On direct examination he testified that driving toward the island at night the post was black and dingy, and that about the only thing one could see were the 2 lights about 20 or 25 feet in the air. On cross-examination, he testified that it was not a well lighted intersection, and that the conditions in March, 1942 were exactly the same. Victor Kaufman managed the gas station on the northeast corner of the intersection which faced toward the post, from February, 1941 until the end of March, 1942. He was well acquainted with the corner. The distance from his gas station to the post was 110 feet. There was nothing to obstruct his view looking toward the post. He testified that the pole was not noticeable "from either our driveway or the gas station office", because the market behind the gas station on the southwest corner "created a dark background into which the pole blended"; that the "background was very dark at night and that the post from the gas station was absolutely not noticeable at night". He testified further that during March, 1942 he had occasion to approach the post from the east in an automobile every evening on his way home, and that on such occasions the post was noticeable "only when you got real close to it". On cross-examination, he testified that the light that was thrown from the post on to the island did not show the abutment on the street; that for traffic going west on Ridge Avenue the post was not noticeable; that he could not see the abutment when it was dark; and that "the island positively wasn't noticeable from my gas station or from this corner". There was evidence from which the jury had the right to conclude that defendant failed to keep the post in such condition as to be visible to those on the highway. At the time it was erected, the post was striped as a warning to motorists that an obstruction was present. This imposed on the defendant the responsibility of keeping the post painted and clean so as to make it visible to those driving vehicles. There was evidence which warranted the jury in finding that the defendant did not fulfill this duty in this behalf.



the intersection. As worked there in January and March, 1941. On direct examination he testified that driving toward the island at night the post was black and shiny, and that about the only thing he could see were the lights about 50 or 75 feet in the air. On cross-examination, he testified that it was not a well lighted intersection, and that the conditions in March, 1941 were exactly the same. Visitor Kaufman examined the eye witness on the northeast corner of the intersection which faced toward the post, from February, 1941 until the end of March, 1942. He was well acquainted with the corner. The distance from his eye station to the post was 110 feet. There was nothing to obstruct his view looking toward the post. He testified that the post was not noticeable "from either our driveway or the eye station office", because the work he had the eye station on the south-west corner "erected a large background into which the post blended"; that the "background was very dark at night and that the post was the eye station was absolutely not noticeable at night". He testified further that during March, 1942 he had occasion to approach the post from the east in an automobile every evening on his way home, and that on such occasions the post was noticeable "only when you got real close to it". On cross-examination, he testified that the light that was thrown from the post on to the island did not show the minutiae on the street) that for traffic going west on ridge avenue the post was not noticeable; that he could not see the minutiae when it was dark; and that "the island positively wasn't noticeable from my eye station or from this corner". There was evidence from which the jury had the right to conclude that defendant failed to keep the post in such condition as to be visible to those on the highway. At the time it was erected, the post was striped as a warning to motorists that an obstruction was present. This imposed on the defendant the responsibility of keeping the post painted and clean so as to make it visible to those driving vehicles. There was evidence which warranted the jury in finding that the defendant did not fulfill this duty in this behalf.

Plaintiff's testimony also discloses that 9 or 10 similar occurrences, preceding his, happened at the same place, all involving northwest bound cars and that the City was notified of each. The case of Rohwedder v. City of Chicago, 322 Ill. App. 700, reported in abstract form, presented a state of facts parallel with the facts in the instant case. The mishap occurred at the same intersection and involved the maintenance of the same island. In the Rohwedder case the visibility of the pole and island was reduced by snow, while in the instant case such visibility was reduced by rain. In that case it was disclosed that 9 or 10 similar accidents preceded plaintiff's mishap, all involving northwest bound cars. It is undisputed that defendant had done nothing to the pole or the island to reduce the dangers to motorists since the mishap which was the basis of the Rohwedder case, in which the jury returned a verdict for plaintiff in the sum of \$10,000. The trial court entered judgment notwithstanding the verdict in favor of defendant. Upon appeal we reversed the judgment and remanded the cause with directions to enter judgment upon the verdict. A petition for leave to appeal was denied by the Supreme Court on September 14, 1944. From a careful consideration of the record, we are convinced that there was competent evidence to sustain plaintiff's charge that defendant was guilty of negligence which was the proximate cause of the mishap, in maintaining the safety island and pole, and that plaintiff was in the exercise of due care and caution for his own safety at and about the time of the mishap.

Defendant also argues that the verdict is against the manifest weight of the evidence, insisting that plaintiff failed to prove that defendant was guilty of negligence which was the proximate cause of his injury, or that he was in the exercise of due care and caution for his own safety at and immediately prior to the time of the occurrence. We find that the verdict is not against the manifest weight of the evidence. The evidence presented questions of fact which the jury was competent to pass upon. We have not outlined the testimony



Plaintiff's testimony also disclosed that 9 or 10 similar occurrences, preceding this, occurred at the same place, all involving northwest bound cars and that the City was notified of each. The case of Hopwood v. City of Chicago, 324 Ill. App. 700, reported in abstract form, presented a state of facts parallel with the facts in the instant case. The latter occurred at the same intersection and involved the maintenance of the same island. In the Hopwood case the visibility of the pole and island was reduced by snow, while in the instant case such visibility was reduced by rain. In that case it was disclosed that 9 or 10 similar accidents preceded Plaintiff's mishap. All involving northwest bound cars. It is undisputed that defendant had done nothing to the pole or the island to reduce the danger to motorists since the mishap which was the basis of the Hopwood case, in which the jury returned a verdict for Plaintiff in the sum of \$10,000. The trial court entered judgment notwithstanding the verdict in favor of defendant. Upon appeal we reversed the judgment and remanded the cause with direction to enter judgment upon the verdict. A petition for leave to appeal was denied by the Supreme Court on September 14, 1944. From a careful consideration of the record, we are convinced that there was competent evidence to sustain Plaintiff's charge that defendant was guilty of negligence which was the proximate cause of the mishap, in maintaining the safety island and pole, and that Plaintiff was in the exercise of due care and caution for his own safety at and about the time of the mishap.

Defendant also argues that the verdict is against the manifest weight of the evidence, insisting that Plaintiff failed to prove that defendant was guilty of negligence which was the proximate cause of his injury, or that he was in the exercise of due care and caution for his own safety at and immediately prior to the time of the occurrence. We find that the verdict is not against the manifest weight of the evidence. The evidence presented questions of fact which the jury was competent to pass upon. We have not outlined the testimony

introduced on behalf of the City. This testimony tended to show that the City was not negligent in the construction and maintenance of the island and pole and that plaintiff was guilty of contributory negligence. Our view is that these issues presented disputed questions of fact which the jury resolved in favor of plaintiff, and that in so doing there was a sound basis for the jury's findings. There was a serious conflict in the evidence as to whether plaintiff was intoxicated, or at least under the influence of intoxicating liquor. It is evident that the jury resolved this dispute in favor of plaintiff and we are of the opinion that there was competent evidence on which to base such a finding.

There was received in evidence, without objection, plaintiff's Exhibit No. 20, the plan prepared by defendant showing the proposed channelization of the intersection, in which it was stated under the heading of "General Notes", that reflector buttons were to be provided for during construction. The evidence shows that the reflector buttons mentioned in the legend were not installed. Defendant urges that the court erred in permitting plaintiff to call to the jury's attention the legend that reflector buttons were to be provided for. This exhibit was admitted for the purpose of impeachment. A witness for the City testified that the intersection was adequately illuminated. This witness had previously, by approval and endorsement of such plan, shown that reflector buttons were necessary. We are of the opinion that the court did not err in permitting plaintiff's attorney to call the jury's attention to the legend. Defendant also complains of the action of the court in refusing to permit its traffic engineer to testify that the plan was not the final plan adopted by the City. We are of the opinion that the court should have permitted the City to so show. However, the court's action did not harm defendant. The jury knew that the island and pole were erected by the City authorities and must have concluded that the manner in which the project was





completed was in accordance with the determination of the proper officials.

Defendant maintains that the court erred in admitting evidence as to prior mishaps. We are of the opinion that the evidence as to prior mishaps was admissible for the purpose of showing that defendant had notice of the conditions prevailing and also for the purpose of showing that the common cause of such mishaps was a dangerous and unsafe instrumentality. The court did not err in admitting this evidence. Defendant asserts that the court erred in limiting the cross-examination of Katherine Bertola, a nurse at the Edgewater Hospital. We are of the opinion that there was no abuse of discretion in so limiting the cross-examination.

Defendant complains of the refusal to give the following instruction:

"The court instructs the jury that the burden of proof is not upon the defendant to show that it is not guilty of the specific negligence charged in the complaint, or in some count thereof, but the burden is upon the plaintiff to prove that the defendant is guilty, and this rule as to the burden of proof is binding in law, and must govern the jury in deciding the case. The jury have no right to disregard said rule or to adopt any other in lieu thereof, but in considering the evidence and coming to a verdict, the jury should adhere strictly to said rule."

The court gave the following instruction:

"The jury are instructed that the plaintiff is required by law to prove his case by a preponderance of the evidence before he can recover. If the plaintiff in this suit has not so proven his case, or if the evidence is evenly balanced so that the jury are in doubt and unable to say on which side is the preponderance, or if the preponderance of the evidence is in favor of the defendants, then, in either of these cases, the verdict should be not guilty. The court instructs the jury that if you believe from a preponderance of the evidence that the plaintiff was injured as the result of the accident which occurred without the fault either of the plaintiff or of the defendant, or either of them, then you are instructed the plaintiff cannot recover and you should find the defendant not guilty."

We agree with plaintiff that the refused instruction was repetitious. Defendant also complains of the refusal of the court to give the following instruction:

"The court instructs the jury that the fact of the happening alone is not any evidence of negligence on the part of the defendant, but before the plaintiff can recover he must prove by a preponderance of the evidence that the defendant was guilty of negligence which caused the injury, and that the plaintiff himself was free from any want of ordinary care for his own safety."



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The court gave the following instructions:

"The jury was instructed that the plaintiff is entitled to prove his case by a preponderance of the evidence and that he can recover. It is the duty of the jury to weigh the evidence, or if the evidence is evenly balanced so that the jury is in doubt and unable to say on which side is the preponderance, or if the preponderance of the evidence is in favor of the defendant, then, in either of these cases, the verdict should be for plaintiff. The court instructed the jury that it is to believe from a preponderance of the evidence that the plaintiff was injured as the result of the accident which occurred without the fault either of the plaintiff or of the defendant, or either of them, then you are instructed to find for the plaintiff. But I repeat and you should find the defendant not guilty."

We agree with Justice Brandeis that the religious exemption was unconstitutional.

Defendant also complains of the refusal of the court to give the

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"The court instructs the jury that the fact of the defendant's having been injured by the defendant's negligence is not any evidence of negligence on the part of the defendant, but before the plaintiff can recover he must prove by a preponderance of the evidence that the defendant was guilty of negligence which caused the injury, and that the plaintiff himself was free from any want of ordinary care for his own safety."



The court gave the following instruction:

"The court instructs the jury that if you believe from a preponderance of the evidence that the plaintiff was injured as the result of the accident which occurred without the fault either of the plaintiff or the defendant, or either of them, then you are instructed the plaintiff cannot recover and you should find the defendant not guilty. You are instructed that with reference to its streets the City of Chicago is not an insurer against accident; nor is it required, under the law, to keep its streets in an absolutely safe condition; nor is it required to exercise the highest degree of care, or extraordinary degree of care, to keep the same in a reasonably safe condition for ordinary travel thereon, nor is it required to so construct and maintain its streets as to secure immunity from accident to persons who may have occasion to pass over or along the same in ordinary modes of travel. Its only duty being to exercise ordinary care to keep its streets in a reasonably safe condition."

We are of the opinion that the substance of the refused instruction is amply covered in the two quoted instructions. Defendant asserts that the court erred in refusing to give the jury the following instruction:

"If you believe from the evidence that the automobile in which plaintiff was riding was driven over and across the portion of the street where the accident was alleged to have occurred at a rate of speed that was negligent, and that said negligence, if any, was the cause of the accident in question and that the proximate cause of the accident in question was the speed at which the automobile was driven, that the condition of said street was not the proximate cause of said accident, then you should find the defendant, City of Chicago, not guilty. If you believe from the evidence that the driver was negligent in driving his car on the occasion in question, and that the condition of the road was such that no injury would have been suffered by the plaintiff if the driver had exercised ordinary care in driving said car, then there can be no recovery against the City of Chicago."

Defendant states that these instructions should have been given because they represented a portion of the theory of the defendant at the trial of the case. The court instructed the jury as follows:

"If you believe from the evidence, that at the time and place in question the plaintiff did not exercise that degree of care and prudence which an ordinarily careful and prudent person would use under like circumstances, as shown by the evidence, then the plaintiff is not entitled to recover, and you should find the defendant, City of Chicago, not guilty. If you believe from the evidence that prior to the time of the accident in question the plaintiff was familiar with the condition of the street, at the place where the said accident is alleged to have occurred and knew that a dangerous





condition existed there or that, by reason of having used said street, at said place prior to the time of said alleged accident he would or should have known of such dangerous condition, if any there was, then you are instructed that he was in duty bound to use such care and caution for his own safety commensurate with the knowledge which he had, or which by the exercise of ordinary care on his part he would or should have had, of such condition of said street at said time and place, and if you believe from the evidence that he did not use such care and caution for his own safety at the time and place in question and that such failure to use such care proximately contributed to cause the alleged accident, then you should find the issues for defendant City of Chicago."

We are of the opinion that the court did not err in refusing to give the instruction quoted and that the jury was fairly and fully instructed on all the issues presented and supported by the evidence. Defendant urges that the court erred in failing to instruct the jury in the proper use of the mortality table which was offered in evidence by plaintiff. The table showed that the plaintiff had a life expectancy of 26.32 years. This table was admitted by agreement of the parties. Plaintiff's instruction on damages did not contain any direction to the jury as to the use of the mortality table in the measurement of damages. Defendant did not tender any instructions with respect to the use of the mortality table. Under the circumstances, the court did not err in failing to give a special instruction on the subject.

Finally, defendant insists that the sum of \$100,000.00 is excessive and not the result of careful deliberation. The automobile damage amounted to \$750.00, and there was expended for nurses, hospital and medical care the sum of \$1,424.09. Plaintiff's physical injuries were serious, as a result of which he became insane and had to be confined to an insane asylum. The medical witnesses testified that the mental disease so brought about is permanent. He was a man of technical training whose income was rising with the years, having reached a point of over \$17,000 at the time of the mishap. If we assume that he would live to be 70 years of age, that would give him 26 years more for continued application to his position. The





mortality table gave him 26.32 years. On that basis alone there would be a loss of earnings totaling over \$440,000. Defendant maintains that the closing argument of plaintiff's counsel was prejudicial and inflammatory. The closing arguments are not in the record. Defendant presents the record of a statement of defendant's counsel during the motion for a new trial, as to what was argued to the jury. There is nothing in the record to support defendant's contention that plaintiff's counsel prejudiced the jury by improper argument. In our view the judgment of \$100,000 is not excessive. For the reasons stated, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

KILEY, J. CONCURS.

LEWE, J. TOOK NO PART.



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NOBLE W. LEE and THE JOHN MARSHALL  
LAW SCHOOL, a corporation not for  
profit,

Plaintiffs - Appellees,

v.

RALPH E. MORRIS, et al,

Defendants,

Interlocutory Appeal of RALPH E. MORRIS,

Defendant - Appellant.

INTERLOCUTORY APPEAL

FROM CIRCUIT COURT,

COOK COUNTY.

326 I.A. 555

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

Defendant Morris has appealed from an interlocutory order granting a temporary injunction. (Chap. 110, Par. 202, Sec. 78 Ill. Rev. Stats.) Plaintiff's motion to dismiss the appeal because the issues have become moot was taken with the case.

The complaint was filed May 12, 1944 and the same day the injunction issued without notice or bond restraining defendants from "interfering with the use and operation" of certain printing material and equipment; and from "spending or conveying" certain moneys. Plaintiff alleged that Morris received the property and money as his trustee, and that the several defendants had conspired to withhold the trust property from him. The injunction issued in accordance with Count I of the complaint which in addition sought other remedies. Count 2 "At Law" sought damages.

The interlocutory order was entered May 12, 1944 and defendant's appeal bond was filed June 14, 1944, 33 days thereafter. Defendant's motion to dissolve was denied May 19, 1944. Defendant argues in his brief, and his appeal bond recites, that the appeal is from the order granting the injunction. Plaintiff, therefore, urges that we have no jurisdiction to consider the appeal since



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They are also to be made provisions

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(U.S. GOVERNMENT PRINTING OFFICE)

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The application was filed with the court on 11/11/11.

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1979 "Private to Public" and the Problem of Inflation

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...in the trial, and all agreed that the witness

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the appeal bond was not filed within 30 days of the order granting the injunction, even if such an appeal were available to defendant; that defendant has by that provision in his bond and by his argument eliminated the denial of the "motion to dissolve" as the basis of his appeal under Sec. 78 Civil Practice Act; and there was no motion "to vacate" as required by the Supreme Court Rule 31 to furnish a basis for the appeal. Under Section 78 of the Practice Act (Chap. 110, Par. 202 Ill. Rev. Stats.) an appeal may be taken from an order granting a temporary injunction or from an order denying a motion to dissolve the same within 30 days after entry. Rule 31 of the Supreme Court, and 21 of this court, imposes the further condition where the injunction is granted upon an ex parte application, that a motion "to vacate" shall first be made and the appeal shall be within 30 days from its denial where acted upon or from the seventh day of its presentation where not acted upon. The purpose of the Rules was to give the trial court an opportunity to rectify any mistake that might have arisen out of the ex parte nature of the application. Balaban & Katz Corp. v. Rose, 283 Ill. App. 615; Nichols Illinois Civil Practice Act, Vol. 6, Sec. 5980. Under the Rules defendant may appeal from the order granting an injunction within 30 days after the denial, etc. of his motion to vacate, and under section 78, within 30 days from the order denying his motion to dissolve. Viewing the purpose of the rules referred to and considering that the courts have used the terms, "motion to dissolve" and "motion to vacate" interchangeably (Grossman v. Grossman, 304 Ill. App. 507; Balaban & Katz v. Rose, 283 Ill. App. 615; Chicago Title and Trust Co. v. Provol, 282 Ill. App. 173), we believe we have jurisdiction.





The defendant contends, among other things, that the injunction should not have issued without notice or without bond, since no showing was made that unless the injunction issued without notice, plaintiff would be unduly prejudiced, and no showing made to excuse the giving of the bond; and that the verification of the complaint was faulty. Plaintiff says that the motion to dissolve admitted each and every allegation of the complaint and of the "seven affidavits" in support of the complaint and, therefore, waived the defects. Affidavits should not be filed or considered on a motion for a preliminary injunction in any case. (Dunne v. County of Rock Island, 273 Ill. 53; McNevin v. Stoolman, et al., 235 Ill. App. 449.) We shall not consider them nor any proceeding subsequent to the granting of the injunction but shall judge the order on the pleadings as they existed at the time the order was entered. (Cohen v. Sparberg, 316 Ill. App. 140; Bauer v. Lindgren, 279 Ill. App. 397, 406.) The motion to dissolve directly attacked the issuance of the injunction without notice or bond and, accordingly, preserved the points. Grossman v. Grossman; Wagner v. Okner, 306 Ill. App. 601.

The paragraph of the complaint relied upon to justify excusing of the notice is paragraph 27 which alleges that Morris "threatens to remove, sell and convey" the property so as to put it "beyond the reach of the plaintiffs" and "threatens to spend that portion of the \$4500 now in his hands". Section 3 of the Injunction Act, Chap. 69, Ill. Rev. Stats, provides that no injunction shall issue without notice "unless it appears from the complaint or affidavit accompanying the same that the rights of the plaintiff will be unduly prejudiced if the injunction is not issued immediately or without notice." There is no allegation when or to whom the threats were made or whether plaintiff feared that Morris would carry out the alleged threats. In brief there are no facts in that paragraph





in the complaint or in the affidavit in the complaint, which would justify this extraordinary remedy. Balaban & Katz Corp. v. Rose; Grossman v. Grossman; Wagner v. Okner.

Plaintiff says that because a bond was filed on May 23, 1944, when defendant's motion to dissolve was denied, that any harm suffered by defendant was then cured. We repeat that the question whether the injunction issued improvidently must be determined as of the date it issued. Kessie v. Talcott, 305 Ill. App. 627. The allegation relied upon to excuse the bond is that "the plaintiffs are well-known and financially responsible persons \* \* \*." Section 9 of the Injunction Act provides for bond in injunction cases except where "for good cause shown" the trial court is of the opinion that the injunction should issue without bond. The fact that the order granting the injunction makes a finding that the writ shall "for good cause shown, issue without bond", avails nothing unless cause is shown by the record. Wagner v. Okner. The issuance of an injunction without giving a bond rests largely in the discretion of the court, nevertheless, a sufficient showing must be made on which to base the discretion. Grossman v. Grossman. The fact that plaintiffs may be well-known and financially responsible are not facts showing good cause. To justify excusing the bond on the ground that defendant was secured against loss through the issuance of the injunction, because the plaintiff had sufficient means to respond in damages, (Weinstein v. Levin, 45 N. E. (2d) 891) the complaint or the affidavit supporting the same should contain facts showing the financial condition of the plaintiffs to the extent that a fair inference could be drawn that defendant would be just as well protected as though bond were given. There are no such facts in the complaint or affidavit. The fact that plaintiffs are well-known adds nothing.



in the complaint or in the affidavit in the complaint, which would

justify this extraordinary remedy. Winters v. New York, 333 U.S. 127.

Winters v. New York, 333 U.S. 127.

Plaintiff says that because a bond was filed on May 15,

1944, when defendant's action to dissolve was denied, that may

have enticed by defendant and then denied. He claims that the question

whether the information furnished is substantially true or not is

of no consequence. Winters v. New York, 333 U.S. 127. The

allegation relied upon to arrest the writ is that the plaintiff's

are well-known and financially responsible persons - 2. Section 9

of the Information Act provides for bond in information cases except

where "for good cause shown" the writ is issued. It is the opinion that

the defendant should have shown "good cause." The law that the order

arresting the information makes a finding that the writ shall "stay"

good cause shown, there is no bond, and the writ shall issue is

shown by the record. Winters v. New York, 333 U.S. 127. The issuance of an information

without giving a bond is not a basis for the issuance of the writ.

Nevertheless, a writ of habeas corpus may be issued on other grounds

the information. Winters v. New York, 333 U.S. 127. The fact that plaintiff may

be well-known and financially responsible and not being shown good

cause. To justify arresting the bond on the ground that defendant

was shown to have shown the issuance of the information,

because the plaintiff had sufficient cause to warrant in charging,

(Winters v. New York, 333 U.S. 127) the complaint or the affidavit

concerning the case would entitle them to the writ.

issuance of the writ is in the writ that a writ of habeas corpus could

be shown that defendant would be just as well protected as though

good were given. There are no such facts in the complaint or affidavit.

The fact that plaintiff is well-known and financially

In the affidavit supporting the complaint the affiant swears that he had read the complaint, knew the contents thereof, and that the same was true "to the best of his knowledge, information and belief." There are no paragraphs of the complaint which are stated to be on information and belief, so that it is impossible to say which paragraphs are true to the best of the affiant's knowledge and which are true to the best of his information and belief. This is sufficient to show the deficiency in the affidavit. Setting aside considerations of other weaknesses in the complaint as basis for an injunction, we have found enough to show clearly that the injunction issued improvidently.

Plaintiff says the defendant has waived all points raised because, following his motion to dissolve, he filed an answer. The complaint in this case was composed of a count in equity praying for an injunction and other relief, and a complaint at law claiming damages. Plaintiff's "motion to dissolve" the injunction had no bearing on the merits of the case. It admitted the facts well pleaded for the purpose of determining whether the injunction should have issued. It did not admit the facts as bearing upon other relief sought. The Injunction Act provides that "a motion to dissolve may be made at any time upon answer, \* \* \*." If defendant had the right to make his "motion to dissolve" as part of his answer, we see no logic in the contention that by making the motion first, he waived the points raised by the subsequent filing of his answer.

For the reasons given the order granting the injunction is reversed.

ORDER REVERSED.

BURKE, P.J. CONCURS.

LEWE, J. TOOK NO PART.



In the affidavit submitted the complainant the witness  
swears that he has read the complaint, knows the contents thereof,  
and that the facts are true to the best of his knowledge, information  
and belief. There are no statements of the complainant which are  
stated to be on information and belief, so that it is impossible  
to say which statements are true to the best of the witness's  
knowledge and belief and which are true to the best of his information and  
belief. This is sufficient to show the belief in the affidavit.  
Section 100 of the Constitution of the United States in the second part  
reads for an indictment, we have found enough to show clearly that  
the indictment issued is invalid.  
The witness says the defendant has never been indicted.  
However, following his return to the office, he filed an answer, the  
complaint in this case was composed of a grand jury finding for  
an indictment and other relief, and a complaint is now pending  
generally. Plaintiff's action is invalid, and defendant has no  
standing on the merits of the case. It appears the facts will appear  
for the purpose of determining whether the indictment should have  
issued. It did not exist the facts as pending upon this relief  
sought. The indictment set forth that a certain person is guilty  
of such and such upon answer, &c. &c. It is determined that the right  
to make his action is invalid, as part of the answer, so that no  
logic in the contention that he makes the action valid, he relies  
the points raised by the respondent filing of his answer.  
For the reasons given the order granting the indictment  
is reversed.

ORDER REVERSED.

WILLIAM W. FIVE  
JAMES H. FIVE

STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT

FILED  
JUL 7 1945  
*Stanley B. Brown*  
CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT ILLINOIS

May Term, A. D. 1945

Term No. 44014

Agenda No. 13.

ANNA VAN HOOSER,  
Plaintiff-Appellee,  
vs.  
RAY E. FICK,  
Defendant-Appellant.

Appeal from the  
Circuit Court of  
Massac County.

BRISTOW, J.

326 I.A. 593

Anna Van Hooser, plaintiff below and appellee herein will be referred to hereafter as the plaintiff, and Ray Fick, the appellant as the defendant. In December, 1931, the plaintiff was the owner of the real estate involved in this litigation, and also a forty acre tract adjoining the same. The plaintiff built a new home on the forty acre tract and moved into it, and at the same time permitted her son, the defendant, to take possession of the eighty acres. The exact nature of the understanding between the two at the time the defendant was permitted to farm this eighty is the basis of the controversy that developed this appeal.

The plaintiff's position is that her son was told when he moved onto the land in question, that he should keep all taxes paid, pay the insurance on the buildings, and that if he did that he could have for himself all he made on the farm. She contends that there was no definite understanding as to how long he should be permitted to remain there. In January, 1944, the plaintiff decided that she wanted her son to surrender possession, and to that end had served on him a notice to quit within thirty days. Pursuant thereto, on February 19, 1944, she went before a Justice of Peace, filed a complaint, and after a hearing, a judgment for possession of said





premises was entered by said Justice of Peace. From this order an appeal was duly perfected to the Circuit Court of Massac County, Illinois, and after a hearing without a jury, the Court found the issues for the plaintiff, and found that the defendant had been served with a thirty day notice and rendered judgment for immediate possession and cost for the plaintiff. The defendant seeks a reversal of this judgment in this court.

The defendant relates a different version of what was said at the time he took possession of the land in question. He says that his mother told him that if he would move onto the eighty acre tract of land, pay the taxes and keep up the insurance, at her death the premises would be his. Immediately the son says he accepted his mother's offer, took possession of the land, has paid all the taxes and insurance, and that during the twelve years preceding the present controversy made permanent improvements consisting of the following: reroofed the house, built more than a mile of fencing, cleared and straightened the fields, built an all weather road, also built a new flue and concrete steps, and also built a barn, garage smokehouse and toilet. The defendant contends that in view of the foregoing facts he was not a mere tenant at will, but that he was holding possession as a promisee or vendee under a contract for a purchase of the real estate in question; and that he had complied with all the terms of the contract under which he acquired possession, and that such compliance constituted a complete defense to his mother's claim for possession. The defendant further contends that since his possession was predicated upon a contract for the purchase of the premises, the mere giving of a thirty day notice did not give the court jurisdiction. In support of this proposition, the defendant cites sections two and three of the Fifth clause of Chapter 57, Revised Statutes of the State of Illinois. If the plaintiff is correct in her contention that the defendant was a tenant at will then the above quoted sections do





not apply. Let us therefore advert to the record and briefly detail the testimony offered on the trial below.

The plaintiff when asked under what circumstances her son moved onto the farm said, "Well, I felt that he needed a comfortable place for his family, and I fixed the place up as comfortable as I could, under the circumstances, and I told him that if he would pay the taxes, the insurance and take care of the place, he could have what he made, and I felt that he could have the place, but he was so cruel to the family that they left him." Motions to strike the latter part of the answer were sustained. This questioning also appears:

"Q. And at the time he moved onto the place was there any understanding just as how long he should stay there?

A. No, sir.

Q. Was it an indefinite time that he should stay there?

A. Yes."

On cross examination of the plaintiff the following appears:

"A. Was there or was there not an agreement if he would go on to the premises and pay the taxes, keep up the insurance, take care of the premises, he could have it?

A. I didn't say he could have it, I said he could have what he made off of it.

Q. He would have that anyway, wouldn't he? I am asking you if he wasn't to have the premises if he did that?

A. Circumstances alter cases.

Q. I am asking you what took place at that time?

A. I don't remember exactly what were the words, but I told him that he could have what he made if he did that.

Q. But you didn't tell him he could have the farm if he did that?

A. I didn't give it to him, no.

\*\*\*\*\*

Q. I will ask you, Mrs. Van Hooser, if it wasn't the understanding





when he went there that he was to have this place and that the sister was to have another forty acres of land and five hundred dollars? Refresh your recollection now and see if that isn't right.

A. It was agreed it should be divided that way, but I sold the other forty and probably things should be arranged now, and I feel very much alive and decided I can take care of my own business.

Q. At that time that was the arrangement wasn't it, that the girl was to have the forty acres and five hundred dollars and Ray was to have the eighty acres at your death?

A. I am not dead yet.

Q. I am not talking about that, but I am asking you if that wasn't the arrangements?

A. Yes, we agreed to that, but I never made anything else.

Q. Now, if I understand you -- the Court wants to know the truth about it and so do you, you claim that Ray was to have the eighty acres if he went on and paid the taxes and took care of it, he was to have the eighty acres at your death and that the daughter was to have forty acres and five hundred dollars at your death, and that was the understanding at that time in effect?

A. We agreed to these things."

On redirect examination of the plaintiff, the following appeared:

"Q. And it was talked over that that would be the way the property would be divided at your death?

A. Yes, sir.

Q. But now you have sold the forty acres, so it would be impossible to divide it that way, wouldn't it?

A. It looks that way to me."

The direct examination of the defendant reveals the following:

"Q. You heard Mrs. Van Hooser testify as to the arrangements made at the time you went into possession of this land?





A. Yes, sir.

Q. Now did you understand her to say that at the time you was to have the eighty acres of land and your sister was to have the forty acres and five hundred dollars at the death of your mother?

A. That was the arrangement."

It appears from the foregoing that the plaintiff in no less than five places said that she did not intend to give her son the eighty acres by virtue of his moving onto the place and paying the taxes and insurance. Being further pressed on cross examination she did admit that there was some understanding that her son was to receive the eighty upon her death and her daughter was to receive the forty and five hundred dollars. The trial court seeing and hearing the mother and son testify was in a much better position than we in attaching meaning and weight to their words.

The court could very reasonably believe the plaintiff's version of the arrangements by which her son became possessed of her eighty acres. She said that he could have what he made off of the farm if he paid the insurance and taxes. Surely this cannot be construed to be a contract for purchase but is merely a tenacy at will. Moore's Civil Treatise, Fourth Edition Vol 2 Section 1622. If the defendant has any rights they are of an equitable nature. Herrell vs. Sizeland, 81 Illinois 457, and Cross vs. Campbell, 89 Illinois App. 489.

We are of the opinion that the findings of the trial judge are not against the manifest weight of the evidence. We appreciate the fact that the plaintiff's testimony may be interpreted two different ways, - one indicating a factual situation supporting the Defendant's theory of defense, the other sustaining plaintiff's claim for possession. A trial court has so many more opportunities of evaluating testimony than a reviewing court, that where there is any reasonable basis for his findings they should not be disturbed.

In view of the foregoing we are of the opinion that the judgment of the court below should be and the same is affirmed.

JUDGMENT AFFIRMED.





43394

FRANCIS A. ADAMAITIS,  
Appellee,

v.

HENRY A. GARDNER, Trustee for the  
Alton Railroad Company, a Corporation,  
Appellant.

APPEAL FROM  
SUPERIOR COURT,  
COOK COUNTY.

326 I.A. 394

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff, of a switching crew in the service of the Alton Railroad Company, was on April 19, 1944, at about 3:40 A.M., injured in an operation in the Harrison Street yards of the railroad in Chicago. He sued under the Federal Employer's Liability Act, alleging that at the time of the injury he was exercising due care while the railroad was negligent in several ways, designated as a, b, c, d, e, and f, resulting in injury to him.

The complaint was amended to make Gardner, as Trustee for the railroad company, defendant. The cause was put at issue and tried by jury. There was a motion by defendant at the close of all the evidence for a directed verdict in his favor, denied.

The jury returned a verdict of guilty, assessed damages at the sum of \$3,000.00, and in answer to interrogatories replied that the switch was not in a reasonably safe condition at the time of the accident; that the activity in which plaintiff was engaged directly, closely and substantially affected Interstate Commerce, and that the sole, proximate cause of the accident was not due to the manner in which the plaintiff threw the switch.

The defendant moved to set aside the findings of the jury and its verdict and for a new trial. Plaintiff remitted



FRANCIS A. ADAMS, JR.,  
Appellee,

v.

ALTON RAILROAD COMPANY, Trustee for the  
Appellant.

ALTON RAILROAD COMPANY,  
Trustee for the  
Appellant.

38814.54

MR. PRESIDING JUDGE: WILLIAM H. HARRIS, OF THE COURT.

Plaintiff, of a railroad company, in the service of the  
Alton Railroad Company, was on April 12, 1904, at about 1:45

A.M., injured in an accident in the Western Street yards

of the railroad in Chicago, he used under the Federal Employers'

Liability Act, alleging that at the time of the injury he was

exercising due care while the railroad was negligent in several

ways, designated as a, b, c, d, e, and f, resulting in injury to

him.

The complaint was amended to read: "whereas, as stated

for the railroad company, defendant. The case was put at

issue and tried by jury. There was a motion by defendant at

the close of all the evidence for a directed verdict in his

favor, denied.

The jury returned a verdict of \$10,000, assessed damages

at the sum of \$10,000.00, and in answer to interrogatories

replied that the switch was not in a reasonably safe condition

at the time of the accident; that the activity in which plain-

tiff was engaged directly, closely and substantially affected

Interstate Commerce, and that the sole, proximate cause of the

accident was not due to the manner in which the plaintiff threw

the switch.

The defendant moved to set aside the findings of the

jury and its verdict and for a new trial. Plaintiff resisted

2.

from the verdict all in excess of \$750.00, whereupon the court denied a motion of defendant for judgment notwithstanding the verdict/<sup>or</sup> for a new trial, and entered judgment for plaintiff against defendant for the sum of \$750.00, from which defendant appeals.

It is contended for reversal that the motion for a directed verdict should have been granted as defendant was not guilty of any negligence; that the verdict is against the manifest weight of the evidence, that the verdict was the result of passion and prejudice, which the remittitur did not cure; and that the trial court erred in giving plaintiff's instructions Nos. 8, 9, 10, and 11.

We hold the court did not err in submitting the issues to the jury. This is a federal question. A request for such an instruction searches the record for evidence to support a denial thereof. Hartford Accident and Indemnity Co. v. Carter, 110 Fed. (2nd) 355, 357, followed by Spiering v. C. & E. I. R. Co., 325 Ill. App. 576, Brady v. Southern Ry. Co., 320 U. S. 476, 479; Bailey v. Central Vermont Ry. Co., 319 U. S. 350, 352.

The plaintiff's charges of negligence in the complaint were that the switch was allowed to become in a sticky or defective condition; of which defendant had, or should have had, knowledge, and that a pillar erected at a position near to the switch, made it difficult for the switchman to perform his service without danger. The gist of the complaint is that defendant was negligent in failing to furnish plaintiff with safe appliances with which to work and a safe place to work in. Several breaches of duty were charged. One that the switch was maintained too close to the pillar at the place where plaintiff was injured, making it difficult to throw the switch in the usual way; that the switch was in a sticking condition as a result of accumulation of sand, etc., and that as maintained



from the verdict all in excess of \$100,000, whereas the court  
 denied a motion of defendant for judgment notwithstanding the  
 verdict for a new trial, and entered judgment for plaintiff  
 against defendant for the sum of \$100,000, from which defendant  
 appeals.

It is contended for reversal that the motion for a  
 directed verdict should have been granted as defendant was not  
 guilty of any negligence; that the verdict is against the  
 manifest weight of the evidence; that the verdict was the result  
 of passion and prejudice, and the verdict is not based  
 and that the trial court erred in giving plaintiff's instructions  
 Nos. 3, 9, 10, and 11.

The court did not err in admitting the evidence  
 to the jury. This is a federal question, a request for such  
 an instruction which the record for evidence is against a  
 general verdict. Revised Decisions and Annotations, 10, 11, 12, 13,  
 110 Vol. (2nd) 327, 328, followed by 100 A. 2d 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

The plaintiff's charges of negligence in the complaint  
 were that the witness was allowed to observe in a place or  
 defective condition; of which defendant had, or should have  
 had, knowledge, and that a pillar erected in a position near  
 to the witness, made it difficult for the witness to observe  
 his service without danger. The gist of the complaint is that  
 defendant was negligent in failing to furnish plaintiff with safe  
 appliances with which to work and a safe place to work in.  
 Several breaches of duty were charged. That the witness was  
 maintained too close to the pillar on the lines when plaintiff  
 was injured, making it difficult to throw the switch to the  
 usual way; that the witness was in a position whereby a  
 result of accumulation of sand, etc., and that an obstruction

3.

there was not sufficient room for clearance between the ball<sup>of the lever</sup> of the switch and the ground upon which the ball rested. There were other charges of negligence not claimed, to be proved. A plat of the switch is in evidence. It shows the tracks and the pillar and the situation accurately. Plaintiff was not required to prove all the allegations of the complaint.

The evidence tended to show that at the time of his injury plaintiff was thirty-five years of age. He had been employed by the railroad as a switchman for some years and for the larger part of the time worked at the Glenn and Brighton Park Yards of the railroad in Chicago. The railroad tracks in these yards ran east and west, curving northeast to the Harrison Street Yard, where the accident happened. The Harrison Yard extends from Polk Street to the Union Depot. The tracks run generally north and south.

On the night before the accident plaintiff reported for work at Brighton Park at 11:30 P. M. to his conductor, Robert Gombas. Other members of the crew were a fellow switchman, Fred Kolze, an engineer, McGifford, and a Fireman, Quinnan. A train of cars was built up, taken down town on the main line to Harrison Street and switched to the No. 1 track there. The train consisted of over fifty cars. In the course of the work it became plaintiff's duty to close a switch located in a quite dark place. There were buildings, driveways and a ramp there, all supported by pillars. Plaintiff says it was 3:40 A. M., and that smoke from the engine obscured vision. The overhead structure made "sort of a tunnel" from north to south, about 150 feet long. The switch was about 50 feet from the south end of the tunnel. The overhead structures were supported by reinforced concrete columns, one of which was right next to the switch. The part of the column on the ground was about 4 or 5 feet long and 1 1/2 feet thick. It ran



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of the lever  
of the switch and the ground when the ball rested.

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proved. A list of the action is in evidence. It involves  
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not required to prove all the allegations of the complaint.

Investigation tended to show that at the time of the

injury plaintiff was thirty-five years of age. He had been  
employed by the railroad as a switchman for some years and for  
the last part of the time worked at the alarm and attention  
Park Lane of the railroad in Chicago. The railroad tracks in  
those yards ran east and west, crossing northeast to the Harrison  
Street Yard, where the accident occurred. The Harrison Yard  
extends from 10th Street to the Union Depot. The tracks run  
generally north and south.

On the night before the accident plaintiff reported for  
work at Harrison Yard at 11:30 P. M. to his conductor, Robert  
Gombas. Other members of the crew were a fellow switchman,  
Fred Colas, an engineer, Hestberg, and a fireman, unknown.  
A train of cars was built up, taken down from on the main  
line to Harrison Street and switched to the No. 1 track there.  
The train consisted of over fifty cars. In the course of the  
work it became plaintiff's duty to close a switch located in  
a wide dark place. There were buildings, bridges and a  
ramp there, all reported by witnesses. Plaintiff says it was  
3:40 P. M., and that smoke from the engine obscured vision.  
The overhead structure made "sort of a tunnel" from north to  
south, about 130 feet long. The switch was about 50 feet  
from the south end of the tunnel. The overhead structure  
was supported by reinforced concrete columns, one of which  
was right next to the switch. The part of the column on the  
ground was about 4 or 5 feet long and 1 1/2 feet thick. It was

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parallel to the tracks. The switch connected No. 1 track with the lead track. The base of the column paralleled the No. 2 or lead track. The switch stand was right at the corner of the pillar, east of the track, about 6 inches north and 1 foot west of the pillar. The switch was a ball and lever type. The lever was about 2 feet long with a big ball, weighing about 25 pounds, on the end of it. When the ball was over the north, the switch was open for No. 1 track. To close the switch so traffic could come down the lead track without going over No. 1, it was necessary to throw the ball from the north to the south. There were about 150 of the same type of switches in the different yards of the railroad. The switch stand was bolted to the south tie, so that when the switch lever came down, it was level with the upper base or the ground. The switches were generally from 4 to 6 inches above the level of the ground. Plaintiff says, however, on this particular switch there was no clearance between the ball and the ground. The ball rested on the ground. On the other switches, where the ball was over the switch, the bottom of the ball was 4 to 6 inches from the ground underneath.

Plaintiff approached the switch and put his right foot on the trigger to release the arm of the switch. He stood in the usual position and put his left foot against the pier. He says: "Normally it went up easily. This time it came up about a third of the way and it stuck there. I gave it a little more effort and when it would not come I gave it a good pull and it came all at once and came out of my hand and came down on my foot. When the handle went out of my hand I slipped on the gravel and that put my right toe under the ball. I slipped on pea gravel. When my foot slipped the ball landed on my toe. Before I slipped my foot was in a position where the ball would not have hit it."

Plaintiff says that the switch was too close to the pillar;





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that the lever was defective, in that it stuck; that gravel and cinders made the footing insecure, and that the lack of clearance between the ground and the ball of the lever was the cause of the accident.

Defendant says plaintiff only attempted to prove negligence in two respects; namely, that the switch was defective or stuck, and that the ballast was level with the ties. He analyzes the evidence as to each of these charges and cites cases, which it is argued, hold as a matter of law that similar evidence was insufficient.

As to the sticking condition of the switch, it is said this was insufficient without proof of notice of this defect to defendant. On this point defendant cites Huff v. Illinois Central R. R. Co., 362 Ill. 95, 101; Patton v. Texas & Pac. Ry. Co., 179 U. S. 658, and New York Central Railroad Co. v. Ambrose, 280 U. S. 486, 489. With other cases he cites Matthews v. Southern Pacific Co., 15 Cal. App. (2d) 36, 59 Pac. (2d) 220, said to be closely analogous to the instant case.

Cases are also cited holding it is not negligence to ballast to the top of the ties, such as Devine v. Calumet R. R. Co., 259 Ill. 449, 459; Lake Erie & Western R. R. v. Morrissey, 177 Ill. 376; Illinois Central Railroad Co. v. Sanders, 166 Ill. 270, 278, and many similar cases.

These are not applicable here. There were some charges of negligence with proof tending to show them without contradiction. The circumstances of each case must be considered. It might well be under the particular circumstances in the cases cited, it was not negligence to ballast to the top of the ties. It does not follow it must be so held under all circumstances, particularly such as appear in this case. It might well be negligence under one set of circumstances <sup>not</sup> to ballast to the top of the ties, while under other circumstances it would be



that the lever was defective, in that it struck; that it struck  
and cylinders made the footing insecure, and that the lack of  
clearance between the cylinder and the ball of the lever was  
the cause of the accident.

Defendant says that it only attempted to prove negli-  
gence in two respects; namely, that the witness was defective  
or struck, and that the ball of the lever was level with the  
cylinders. The evidence as to each of these matters was of  
course, which it is argued, held as a matter of law that  
evidence was insufficient.

As to the evidence consisting of the witness, it is said  
this was insufficient without proof of notice of this defect to  
defendant. On this point defendant cites Ill. v. Illinois

Central R. R. Co., 388 Ill. 97, 101; Yarwood v. Texas & Pac. Ry.  
Co., 179 U. S. 656, and New York Central Railroad Co. v. Johnson,  
220 U. S. 488, 499. With other cases he cites Illinois v.  
Southern Pacific Co., 12 Cal. App. (2d) 30, 32 (1954) 1955.

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particularity such as appear in this case. It might well be  
negligence under one set of circumstances to ballast to the  
top of the ties, while under other circumstances it would be

6.

negligence to do so. This creates an issue for the jury.

The language of Mr. Justice Douglas at page 352 of the Bailey case, 319 U. S., seems to be appropriate.

"The rights which the Act creates are federal rights protected by federal rather than local rules of law \* \* \*. And those federal rules have been largely fashioned from the common law \* \* \* except as Congress has written into the Act different standards. At common law the duty of the employer to use reasonable care in furnishing his employees with a safe place to work was plain \* \* \*. The rule is deeply engrained in federal jurisprudence \* \* \* Patton v. Texas & Pac. Ry. Co., 179 U. S. 658. As stated by this court in the Patton case, it is a duty which becomes more imperative' as the risk increases. 'Reasonable care becomes then a demand of higher supremacy, and yet in all cases it is a question of the reasonableness of the care --- reasonableness depending upon the danger attending the place or the machinery.' \* \* \*. It is that rule which obtains under the Employers' Liability Act."

The controlling questions under the pleadings here are, whether the instrumentalities furnished by the railroad to plaintiff were reasonably safe, whether the plaintiff was furnished a safe place in which to work, and whether there was negligence in this respect which caused the accident and injury. These were, we hold, questions for the jury.

It is also contended the verdict is against the manifest weight of the evidence. It is said the narrations of the manner in which the accident occurred by plaintiff are inconsistent in many ways. Defects of memory in the average human are such that a skillful lawyer on cross-examination will usually be able to bring out statements from which, later, inconsistencies or omission to tell all the truth may well be argued. We have read the evidence as it appears in the abstract and think the credibility of the witnesses was for the jury, and that we ought not to disturb its verdict.

It is also argued that the verdict was so excessive as to indicate passion and prejudice on the part of the jury. There



the language of the law is not to be construed as a limitation on the power of the court to do so. This is the rule in England and in the United States.

The first of these is the fact that the
 number of cases of the disease has
 increased in the last few years.
 The second is the fact that the
 disease is now found in many
 parts of the world which were
 formerly free from it. The third
 is the fact that the disease is
 now found in many parts of the
 world which were formerly free
 from it. The fourth is the fact
 that the disease is now found in
 many parts of the world which
 were formerly free from it.

The controlling question under the Federal Rules is whether the facts contained therein are sufficient to establish the defendant's guilt beyond a reasonable doubt. If the facts are sufficient to establish the defendant's guilt beyond a reasonable doubt, the jury must find the defendant guilty. If the facts are not sufficient to establish the defendant's guilt beyond a reasonable doubt, the jury must find the defendant not guilty. The jury is the trier of fact, and its verdict is final. The judge is the trier of law, and his instructions are final. The jury's verdict is based on the facts as they find them, and the judge's instructions are based on the law as he finds it. The jury's verdict is the final determination of the facts, and the judge's instructions are the final determination of the law. The jury's verdict is the final determination of the facts, and the judge's instructions are the final determination of the law.

was nothing in the facts of the case or in the manner of its trial that should have aroused such prejudice. However, the amount of the verdict led the trial court to the conclusion (with which we agree) that three-fourths of it ought to be remitted. This might cure the verdict if the amount of it was the only alleged error. The case, however, was fairly close on the facts, and the defendant is entitled to a trial by an unprejudiced jury on all these. There is a line of cases in this state holding that a verdict like this, in such a case, cannot be cured by remittitur. Loewenthal v. Streng, 90 Ill. 74; Gleason v. M. F. Byrne Construction Co., 178 Ill. App. 359; Richter v. Tegtmeyer, 167 Ill. App. 478; Chicago & Northwestern Ry. Co. v. Cummings, 20 Ill. App. 333, and Olson v. North, 276 Ill. App. 457. On this point no Federal authority is cited by either party.

It is next urged instructions given at the request of plaintiff were erroneous. Complaint is made of plaintiff's No. 8, which told the jury plaintiff was entitled to a verdict if he had proved defendant was guilty of negligence, as charged in the complaint or some paragraph of it, and that the negligence was the proximate cause of his injuries. Defendant says this authorized a verdict for plaintiff under paragraph 5 (b) and 5 (f) of the complaint, of which latter there was no proof whatever. The instruction is subject to criticism in this respect, although we doubt whether it would have misled the jury. It is also said the instruction was erroneous in omitting the essential requirement of interstate commerce. Avance v. Thompson, 387 Ill. 82, Cert. denied 65 Sup. Ct. 82, is cited. The fact that the parties here were engaged in interstate commerce was admitted by defendant's answer, established by undisputed evidence and found by the jury to be a fact in reply





8.

to a question submitted at defendant's request. It was also found to be a fact in reply to a special interrogatory given at the request of defendant. We hold the instruction was not erroneous for the reasons stated.

Plaintiffs instruction No. 11, which is in the language of the statute, is objected to. The objection was sustained in Spiering v. Chicago & Eastern Ill. R. Co., 325 Ill. App. 476. It may or may not be erroneous to give it. We think it should not have been given under the particular circumstances disclosed by the evidence in this case.

For the reasons indicated the judgment will be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

O'Connor and Niemeyer, JJ., concur.



to a question submitted at defendant's request, it was also found to be a fact in reply to a special interrogatory given at the request of defendant, to which the testimony was not erroneous for the reasons stated.

Plaintiff's instruction No. 17, which is in the language of the statute, is objected to. The objection was sustained in Williams v. Chicago & North Western Ry. Co., 225 Ill. App. 474. It may or may not be erroneous to say it, to which it should not have been given under the existing circumstances disclosed by the evidence in this case. For the reasons indicated the judgment will be reversed and the cause remanded for a new trial.

REVEREND JUDGE

O'Connor and Alexander, Attorneys.

43294

EMMONS C. CARLSON,  
Appellant,  
v.  
IRNA PHILLIPS,  
Appellee.

APPEAL FROM  
CIRCUIT COURT  
COOK COUNTY.

3261.A. 594<sup>2</sup>

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff, claiming a half interest in a radio serial show - The Guiding Light, originally named The Good Samaritan - licensed in December 1936 to Proctor & Gamble through the Blackman Advertising, Inc., New York (hereafter called the Agency), and broadcast over a 48-station network of the National Broadcasting Company (N. B. C.), brought suit for an accounting against defendant as owner of the remaining half interest. The master found for plaintiff. The trial judge sustained exceptions to the master's report and dismissed the complaint for want of equity. Plaintiff appeals.

His suit is based on an oral agreement for an equal division of profits, alleged to have been made in September 1936, following an oral agreement in the preceding March or April to collaborate in writing the script for a show combining plaintiff's ideas on the problems of a melting pot community and defendant's outline for a show entitled The Good Samaritan, built around a minister and his daughter.

He claims and the master substantially finds that he skillfully and competently prepared a presentation (a sales prospectus, giving information about the author, an analysis of the characters of the show, the general theme of the , the reasons why it should have audience appeal, etc.) an



IRMA PHILLIPS, v. JAMES C. PHILLIPS, Appellee.

CLERK OF COURT  
COURT HOUSE  
NEW YORK

IN JUDICIAL DISTRICT COURT OF THE CITY OF NEW YORK.

Plaintiff, claiming a half interest in a radio serial show - The Missing Link, originally named The Good Samaritan - licensed in December 1938 to Preston & Noble through the Blackman Advertising, Inc., New York (hereinafter called the Agency), and broadcast over a 48-station network of the National Broadcasting Company (N.B.C.), brought suit for an accounting against defendant as owner of the remaining half interest. The master found for plaintiff. The trial judge sustained exceptions to the master's report and directed the complaint for want of equity. Plaintiff appeals.

This suit is based on an oral agreement for an equal division of profits, alleged to have been made in September 1936, following an oral agreement in the preceding March or April to collaborate in writing the serial for a show combining plaintiff's ideas on the problems of a melting pot community and defendant's outline for a show entitled The Good Samaritan, built around a minister and his daughter.

He claims that the master substantially finds that he skillfully and competently prepared a presentation (a sales prospectus, giving information about the author, an analysis of the characters of the show, the general theme of the show, the reasons why it should have audience appeal, etc.) as

2.

audition script (a script or text for a 15 minute episode with flashes - short scenes of future action or plot development - to be produced as if broadcast over the air for a prospective sponsor) which were submitted to the Agency in the sale of the show; that when it appeared likely that a sale would be made, defendant entered upon a course of conduct designed to disregard plaintiff's interest in the show and to claim it and all profits arising out of its sponsorship as her own; that she failed and refused to cooperate with plaintiff in the preparation of scripts or the preparation of daily plots, making it impossible for plaintiff to prepare scripts to fit into the serial continuity of the show; that misrepresenting the amount she was receiving (the contract with the sponsor having been entered into in her name and all payments thereunder having been received by her), she paid him a total sum of \$2,000, purporting to be his one-half of the profits, \$100 a week from the first broadcast, January 25, to June 7, 1937; that thereafter she refused to recognize any interest of plaintiff in the show or to make any further payments to him.

Defendant claims the show as her sole property. She admits that plaintiff prepared and delivered to her the presentation and audition script, but says in her sworn answer that "plaintiff did so not as a partner of defendant or as a joint adventurer with her and not even as defendant's servant or employee actually hired by defendant as of the time of said delivery; that said delivery was made by plaintiff and accepted by defendant with the understanding that if defendant was pleased with plaintiff's work, she would hire him as her employee; that plaintiff had had no previous experience in the business of writing radio scripts and that he had applied to defendant to become her apprentice in order that he might learn the art of writing radio scripts. In consequence whereof, the presentation



andition script (a script or text for a 15 minute episode with flashes - short scenes of future action or plot development - to be produced as it broadcast over the air for a prospective sponsor) which were submitted to the Agency in the fall of the show; that when it appeared likely that a sale would be made, defendant entered upon a course of conduct designed to displace plaintiff's interest in the show and to claim it and all profits arising out of its sponsorship as her own; that she failed and refused to cooperate with plaintiff in the preparation of scripts or the preparation of daily plots, making it impossible for plaintiff to prepare scripts to fit into the serial continuity of the show; that misrepresenting the amount she was receiving (the contract with the sponsor having been entered into in her name and all payments thereunder having been received by her), she paid him a total sum of \$2,000, purporting to be his one-half of the profits, \$100 a week from the first broadcast, January 25, to June 7, 1937; that thereafter she refused to recognize any interest of plaintiff in the show or to make any further payments to him.

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and audition script referred to above were so inartificially prepared that it was necessary for defendant to make so many revisions in the same as to amount to a totally new and different presentation and audition script."; that after the sale (notwithstanding her claim of plaintiff's alleged incompetency) she employed him under an oral agreement to write script for the show at \$100 a week, but discharged him in June 1937 after paying him \$2,000 because "he was either unable or unwilling to write scripts of satisfactory quality and quantity and thus abandoned all-efforts to perform his duty in that regard." On the trial she testified that plaintiff was very willing to write but did not seem able to.

In 1936 plaintiff was, and since October 1930 had been employed by N. B. C. at Chicago as advertising and sales promotion manager, in which capacity he prepared and wrote, and had prepared and written under his supervision, speeches, articles for trade papers, material for advertising and direct mail campaigns and several thousand presentations used in the sale of radio time and radio programs owned by the company or being sold by it as agent; he had written 3 or 4 radio scripts but none had been put on the air; he was a member of the N. B. C. program planning board, which heard auditions and appraised shows written for the company or submitted to it for sale to sponsors. Defendant was engaged in writing, producing and acting in radio shows; she began writing and acting in 1930; before the sale of The Guiding Light in December 1936, Today's Children was the only serial on a network that defendant had produced or had anything to do with - the only show she had sold to a sponsor; this show was "substantially the same serial or drama" as Painted Dreams, which defendant attempted unsuccessfully to claim as her own. (Phillips v. W. G. N. Inc., 307



and audition script referred to above were so interdictedly prepared that it was necessary for defendant to make so many revisions in the same as to amount to a totally new and different presentation and audition script." That after the sale (notwithstanding her claim of plaintiff's alleged incompetency) she employed him under an oral agreement to write script for the show at \$100 a week, but discharged him in June 1937 after paying him \$5,000 because "he was either unable or unwilling to write scripts of satisfactory quality and quantity and thus abandoned all efforts to perform his duty in that regard." On the trial she testified that plaintiff was very willing to write but did not seem able to.

In 1938 plaintiff was, and since October 1939 has been employed by W. B. O. at Chicago as advertising and sales promotion manager, in which capacity he prepared and wrote, and had prepared and written under his supervision, speeches, articles for trade papers, material for advertisement and direct mailing campaigns and several thousand presentations used in the sale of radio time and radio programs owned by the company or being sold by it as agent; he had written 3 or 4 radio scripts but none had been put on the air; he was a member of the W. B. O. program planning board, which heard auditions and accepted shows written for the company or submitted to it for sale to sponsors. Defendant was engaged in writing, producing and acting in radio shows; she began writing and acting in 1936; before the sale of the Building Light in December 1936, today's Children was the only serial on a network that defendant had produced or had anything to do with - the only show she had sold to a sponsor; this show was "substantially" the same serial or drama as "Painted Dreams", which defendant attempted unsuccessfully to claim as her own. (Exhibit 7, W. B. O., 1937

4.

Ill. App. 1, 7.) Today's Children was sold through N. B. C. in the fall of 1932 and remained on the air until January 1938; May 31, 1934 defendant advised N. B. C. that Walter Eicker had collaborated with her in producing Today's Children and had a one-fifth interest in the program under a verbal agreement, the terms of which do not appear in the record; this interest was terminated July 14, 1936; in 1936 Today's Children was the leading daytime serial (soap opera) on the air; N. B. C. was paying \$1,350 a week for it; defendant was furnishing the scripts, acting the part of the principal character, Mother Moran, and producing the show as a package production (the show complete - program, talent and staging); this netted her something like \$700 a week. In addition to Today's Children defendant had written some of the script for the advertising agency handling The Little Church Around the Corner, a local show on the air 26 weeks. On her own behalf she had written Ma Brown's Patchwork Quilt, which had appeared locally; Masque which had been on the air locally as a sustaining show (a show produced by the broadcasting company without a sponsor), and two day-time serials - Black Earth and Dear Diary - neither of which had appeared on the air. Black Earth had been in the hands of N. B. C. and the Agency, but no sponsor for it had been procured. Dear Diary, placed with the Agency, was withdrawn in October 1936 as not being up to standard.

Plaintiff and defendant had known each other several years. Defendant says that she used to stop at his office practically every day after the Today's Children broadcast, and they were "pretty friendly." Plaintiff testified that in the early part of 1936 he told defendant that he thought there was material for an excellent series of scripts built around a melting-pot community like Ogden, Milwaukee and Chicago



Ill. App. 1, 7.) Kasey's Office was sold through a...

in the fall of 1933 and remained on the same...

1938; May 31, 1934 defendant advised A. J. of the...

had collaborated with her in producing Kasey's children and...

had a one-fifth interest in the program under a verbal agreement...

he took of which he was named in the record; this interest...

was terminated July 15, 1936; in 1936 Kasey's children and the...

leading defunct parties (both parties) on the air; A. J. was...

paying \$1,350 a week for it; defendant was maintaining the...

parties, acting as one of the principal characters, Kasey...

parties, and producing the show as a package produced (the same...

complete - program, talent and equipment); this record was...

thing like \$700 a week. In addition to Kasey's children...

defendant had written some of the script for the advertisement...

agency handling the Little Church around the corner, a local...

show on the air so Kasey, for her own benefit she had written...

a woman's network with, which had produced a daily...

which had been on the air locally as a radio show...

produced by the broadcasting company without a contract, and...

day-time parties - Black Earth and Red Earth - which...

which had appeared on the air. Black Earth had been in the...

part of 1934 and the agency, but no contract was...

been produced, Red Earth, Black Earth, and with...

given in October 1935 as not being up to standard.

plaintiff and defendant had known each other several...

years. Defendant gave Kasey and was named in the office...

practically every day after the Kasey's children married...

and they were 'pretty friendly'. Plaintiff testified that...

the early part of 1935 as the defendant had been...

was useful for an excellent series of parties being...

a well-known community life group, defendant was...

5.

avenues in Chicago (called the Five-points in the Guiding Light) to keep going for years; that defendant agreed and suggested that they collaborate in writing the scripts for a show combining plaintiff's melting-pot with the Good Samaritan -- a show about a minister and his daughter which defendant had outlined; that defendant gave him a two-page outline of The Good Samaritan taken from her files and, after a discussion as to the development of the plot, he wrote the opening script and delivered it to the defendant, who arranged for its audition by N. B. C. in April; that plaintiff did not disclose his connection with the script because he wanted it judged on its merits, unaffected by office jealousies. Defendant testified that on various occasions plaintiff had spoken of his dissatisfaction with his position at N. B. C. and said he would give anything in the world if he could write for radio, and would be very grateful if defendant would only show him what she was doing; that in February or March 1936 she told him she would be only too glad to teach him; and sent him the outline of the Good Samaritan; that in the discussion of the development of the outline plaintiff suggested placing the characters in a melting-pot community and starting the show with a Swedish family and its problems; that defendant assented, and plaintiff wrote the script, which was auditioned, without any change, by the N. B. C. planning board in April. The board appraised it as a "good show, but formula very close to a program submitted some time ago by Gene Arnold"; ~~that~~ it was taken in stock for sale by N. B. C. until May 4, when N. B. C. decided that it would not audition to other accounts The Good Samaritan, Masquerade and Black Earth, submitted by defendant, because she had signed an exclusive contract with the sponsor of Today's Children. Plaintiff testified that a few days after the audition he suggested to defendant making changes in the script, and was told to go



avenues in Chicago (called the five-point in the building  
light) to keep the floor for the defendant's use and  
suggested that they collaborate in writing and editing for  
how combining plaintiff's relationship with the defendant  
a show about a minister and his daughter which defendant had  
outlined; that defendant gave him a two-page outline of the  
of defendant taken from her files and, after a discussion  
as to the development of the plot, he wrote the script which  
and delivered it to the defendant, who arranged for its production  
by J. E. in April; that plaintiff did not disclose his  
connection with the script because he was at the time of the  
script, reflected by other evidence. Defendant testified  
that on various occasions plaintiff had spoken of his dis-  
satisfaction with his position at J. E. and that he would  
give anything in the world if he could write for J. E. and  
would be very grateful if defendant would only give him the  
script as going; that in February or March 1935 he told him  
he would be only too glad to teach him; and that he told him  
outline of the Good Samaritan; that in the discussion of the  
development of the outline plaintiff suggested changing the  
characters in a religious-good community and stating the story with  
a Jewish family and its problems; that defendant suggested, and  
plaintiff wrote the script, which was submitted, with out any  
change, by the J. E. planning board in April. The board  
approved it as a "good show," but found it very close to a previous  
submitted some time ago by J. E. and found it good  
for sale by J. E. until May 1, when J. E. decided that it  
would not submit to other associates the good community script  
and Black Earth, submitted by defendant, because she had signed an  
exclusive contract with the producer of today's production. Plain-  
tiff testified that a few days after the decision he suggested  
to defendant making changes in the script, and was told to do

6.

ahead and that it would be a good idea to project the story for each character; that shortly afterwards he told defendant that he was ready to submit the script and projection of characters, but she replied that she was not feeling well and was going to the hospital; that he did not submit them to her until September -- that in the meantime there had been no nibbles of any kind on the show. Defendant went to the hospital in May and remained there 5 or 6 weeks. She testified that while she was in the hospital, and later in July or August, plaintiff said he would like to go back to The Good Samaritan "to see if we cannot do a little bit more with it. I would really like to get a little more writing experience"; that she told him she wanted to take a vacation and did not know when she would get back to the show; that the first part of September she told plaintiff she was going to New York and said, "If you want to write, why don't I present this (The Good Samaritan) in New York on my way to South America";--that Taylor of the Agency said he would be interested in any ideas she might have: "We don't have any client that I know of, but anyway it is a shot in the dark. If anything happens out of it, fine, and it will give you a chance to write"; that she asked him to make up a presentation and also mentioned certain changes that were to be made in the audition script, but could not pick them out; that she got the script with the changes when she got the presentation, but never discussed the changes with plaintiff; that she objected to the presentation as being "way, way too elaborate," and that she didn't believe it was a good idea to toot one's horn in submitting a play to the Agency; that plaintiff said it was promotional work and what they (N. B. C.) had done on hundreds of presentations; that she had no quarrel with that; that Taylor and McMillan, head of the radio department of the Agency, thought that the presentation was a very well done



...and that it would be a good idea to project the story  
for each character; that finally after some time he told defendant  
that he was ready to submit the script and projection of  
character, but she replied that she was not feeling well and  
was going to the hospital; that he did not want to leave her  
until September - that in the meantime there had been no  
word of any kind on the show. Defendant went to the  
hospital in May and remained there 6 or 8 weeks. She testified  
that while she was in the hospital, and later in July or August,  
plaintiff said he would like to go back to the show and  
"to see if we cannot do a little bit more with it. I would  
really like to get a little more writing experience"; that she  
told him she wanted to take a vacation and did not know when  
she would get back to the show; that the first part of September  
she told plaintiff she was going to New York and said, "If you  
want to write, my son's I guess like (The Good Samaritan) is  
New York on my way to South America"; that Taylor of the agency  
said he would be interested in any show she might have; "I  
can't leave my client that I know of, but anyway it is a shot  
in the dark. If anything comes out of it, fine, and it will  
give you a chance to write"; that she asked him to write up a  
presentation and also mentioned certain changes that were to  
be made in the script, but could not pick them out;  
that she got the script with the changes when she got the pre-  
sentation, but never discussed the changes with plaintiff;  
that she objected to the presentation as being "very, very too  
elaborate," and that she didn't believe it was a good idea to  
take one's work in submitting a play to the agency; that plain-  
tiff said it was professional work and that they (S. S. S.) had  
done on hundreds of other shows; that she had no interest  
with that; that Taylor and McMillan, head of the radio department  
of the agency, thought that the presentation was a good deal more

7.

job and had sent it on to the client. Plaintiff testified that about September 10 defendant said she had told Taylor about The Good Samaritan and he was very much interested; that she would go over plaintiff's script and projection of Characters and would like to have him make up a presentation of the whole show so she could take it and the audition script to New York the next month when she went on her Caribbean cruise; that she asked, "What do you think of asking \*\*\* \$350 a week for the scripts; that will give us each \$175. Is that O. K. with you? We will go 50-50 on the deal." That he replied that he would make the presentation and put the script in final form, and that "\$175 to start is O. K. with me, and I presume that whatever happens we will go 50-50 on the deal," and she said "That is right"; that they were to make out the outline as to what was to go into each day's episode or broadcast and then he was to write the scripts and send them to her for editing; that he was also to do the promotion work relating to merchandise given away on the program in exchange for soap wrappers, etc. (this was also part of his work with N. B. C.); that she said it would be all right with her to put his name under a nom de plume on the fly-leaf of the presentation with herself, and he replied, "For the benefit of any sales possibilities that may exist, let's confine it to your name"; that she made no changes in the script; that he prepared the presentation, using material from the outline of the show given him in March (the only written material ever furnished him by defendant) in writing the conclusion or summing-up of the presentation; that he paid about \$100 for the art work on the presentation for which he never was reimbursed; that defendant objected to the presentation, saying "it is too elaborate. It is not at all like me or what I would do. I thought there would be just a



job and had sent it on to the client. I didn't realize  
 that about a week later I'd be told that the client  
 The Good Samaritan and he was very much interested; that the  
 would go over Plimpton's script and suggestion of characters  
 and would like to have him make up a presentation of the whole  
 show so she could take it and the audience would be for the  
 the next month when she sent on her business card; that she  
 asked, "What do you think of saying 'I'll do a card for the  
 accident; that will give us each \$100. In fact I'll give you  
 We will go \$2-50 on the deal." That he replied that he would  
 make the presentation and put the script in final form, and  
 that "I'll go to start in 2. I'll give me, and I promise that that  
 ever happens to \$100 on the deal," and she said  
 "That is right"; that they were to make out the outline as to  
 what was to go into each day's episode or broadcast and then  
 he was to write the script and send them to her for editing;  
 that he was also to do the presentation work relating to the  
 character given away on the program in exchange for a card  
 envelope, etc. (This was also part of his work with the  
 that she said it would be all right with her to put the name  
 under a nom de plume on the fly-leaf of the presentation with  
 herself, and he replied, "For the benefit of my sales representa-  
 ties that may exist, let's confine it to your name; that she  
 made no changes in the script; that he prepared the presentation,  
 using material from the outline of the show given him in which  
 (the only written material ever furnished him by defendant) in  
 writing the conclusion or wrap-up of the presentation; that  
 he paid about \$100 for the art work on the presentation for  
 which he never was reimbursed; that defendant objected to the  
 presentation, saying "It is too elaborate. It is not at all  
 like me or what I would do. I thought there would be just a

8.

little typewritten presentation"; that just before the audition for the client on December 2nd Taylor told him that the presentation was a "honey," and "It is the Bible around which our entire sales is built." In January 1938, in writing defendant about contemplated publicity of the show in Life, Taylor said that the presentation "might make good publicity to show the way in which you analyze the future of your scripts through the presentation which you submit to an agency contemplating a new show." The presentation and the script were sent to the Agency the early part of October. About this time plaintiff suggested outlining the plot for the 2nd, 3rd, 4th and 5th scripts or episodes so that he could have them ready when defendant returned. She says she didn't see any reason for it - "just because we are sending down a presentation to an agency does not mean anything." They did outline the plots before she left Chicago in October. When in New York the representatives of the Agency suggested that defendant delay or cancel her trip if they could get some reaction from their client as to the program. She refused, saying that she did not know what the client's reaction was and would not give up the only vacation she had had in a number of years. On defendant's return to New York, around the middle of November, McMillan of the Agency advised her that they thought the idea of The Good Samaritan had a great many possibilities and that the client was interested enough to have an audition. She quoted a package production price (a change from the plan of only writing the scripts) of \$850 for a local test. She returned to Chicago November 19th and shortly thereafter received from plaintiff the four scripts he had written, and a flash, to be added to the audition script. She read the scripts quite a bit later. She says that in the first part



little "typewriter presentation"; that the picture was  
submitted for the client on December 1st and Taylor told him  
that the presentation was a "money" and it is the little  
showing which our entire sales is built. In January 1934,  
in writing concerned about contemplated publicity of the  
show in 1935, Taylor said that the presentation which was  
good enough to show the way in which you handle the value  
of your rights through the presentation which you submit, not  
in agency contemplating a new show. The presentation and the  
script were sent to the agency the early part of October.  
That this time plaintiff suggested submitting the plot for  
the 2nd, 3rd, 4th and 5th weeks of episodes so that he could  
have them ready when defendant returned. The same was done  
and my reason for it - "Just because we are sending them a  
presentation to an agency does not mean anything." Why did  
outside the plot before the 1st episode in October. Then  
in New York the representatives of the agency suggested that  
defendant delay or cancel the 1st 4th week could get some  
reaction from their client as to the program. The object,  
saying that the 1st and 2nd show that the client's reaction was  
and would not give up the early weeks and had in a number  
of years. On defendant's return to New York, around the  
middle of November, mention of the money which was that day  
toward the idea of the show suggested that a great many possibilities  
then and that the client was interested enough to have an exhibition  
and quoted a picture production price (a contract for the film  
of only within the contract) of \$250 for a first test. The  
return to Chicago November 1st and shortly thereafter  
received from plaintiff the four weeks he had written, and  
a flash, to be added to the exhibition script. The next day  
from quite a big letter. The says that in the first part

9.

of December she told plaintiff that they "look pretty good, though there will have to be some revision," and claims to have used portions of the four episodes. The master finds that this claim is not supported by a comparison of plaintiff's scripts and those actually broadcast. Mrs. Prys, defendant's secretary and a script writer to whom the scripts had been sent in defendant's absence, wrote plaintiff that she thought "the scripts are very good" and, "It is a very fine job." The flash was sent to the Agency. It requested a new one. Plaintiff and defendant prepared a revised flash, incorporating as its theme plaintiff's suggestion of a rich man in a car running over one of the kids at Five-points and being mobbed. The script, the same as the April audition script except for minor changes made by plaintiff, was auditioned December 2nd at the N. B. C. studios in Chicago and transmitted by wire to Proctor & Gamble at Cincinnati. Plaintiff and Mrs. Prys listened from plaintiff's office. Plaintiff says that shortly after the audition defendant rushed in, shook his hand and said, "Congratulations on the success of our audition. I am quite sure it is going to be sold." Defendant testified that this could have happened. Tentative terms agreed upon in Chicago on December 8 were accepted by the Agency by telegram December 11, and the formal written contract between defendant and the Agency was executed January 27, 1937, two days after the show had gone on the air. By this contract defendant undertook to write, produce and broadcast a radio program to be known as The Good Samaritan (the name was changed to The Guiding Light just before the first broadcast) as a package production, furnishing the complete cast, sound effects, organ, organist, etc., for five 15-minute daily broadcast, Monday to Friday inclusive each week for \$1,200 a week during the first 26 weeks and \$1,400 a week during the remaining 22 weeks of the



of research and the following facts have been obtained:

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contract. Plaintiff did not learn the terms of the contract until after suit was brought. Under a later revision defendant only wrote or supervised the scripts.

Defendant testified that before December 11 she told plaintiff she had settled on a local price but did not think she was getting as much for the show as she should; that she would like to pay plaintiff more for writing but the most she could pay him was around \$100 a week, and if and when increases came in the contract she would be glad to increase his pay accordingly, and that he consented. Plaintiff testified that on defendant's return from New York she told him that she had quoted a package price of \$850 a week; that he said he presumed she had figured enough in the price to take care of the amount they had agreed to charge for the scripts - \$350 a week to begin with; she said that she did not know but that it would be something like that; that after they had finished the revised flash in the latter part of November defendant asked, "What do you expect to get out of this?"; that he asked her what she meant - that they were partners; that she said the expenses were so great that she did not see where "we are going to be able to work out \$350 as a profit to be divided equally between us"; he replied that he was willing to share in the famine as well as the feast and, so long as they stuck to their agreement, whether it be great or small made very little difference; that about three days after the audition defendant said she had received word from the Agency that the show had been sold and they were to get \$850 a week for it; that around the 28th or 29th of January defendant told him she was afraid "our profit is not going to be as great as we had expected. \*\*\* I do not believe that I can work out more than \$125 or \$150 for each of us"; that he replied that if it could not be as they planned





11.

originally, he was willing to go ahead on the reduced return; that he was not criticizing her for the price made, but that she had not consulted him as to the price or expenses, "but we are in this thing together, so the reduced amount is all right with me"; that defendant then said there would be a \$400-a-week increase - that is, a jump from \$850 to \$1,250 a week after the first 26 weeks, and \$1,500 after the first 18 months, and "of course these additions we will split equally so it won't seem so bad"; that on February 10 defendant handed him a check for \$100 and said, "Is it all right?"; that he replied that he knew nothing about the figures, had never seen anything to show what she was getting from the Agency and could not say whether or not the check was his half of the profits; that various payments of \$100 or multiples thereof aggregating \$2,000 were made to him at irregular intervals from February 10 to and including June 23, purporting to cover the period from January 27 to June 7, which he received as covering his share of the profits during that period. Defendant denies having had the conversations testified to by plaintiff; admits that she never told plaintiff she was getting more than \$850 a week for the show, and says that she made payments to plaintiff as salary at the rate of \$100 a week for his services as her employee in writing scripts; that she had to delay the first payment until she received the first remittance from the Agency; that the last payment was made after she discharged plaintiff because he was not writing script.

Plaintiff testified that in the interval between the sale of the show and the time it was put on the air he saw defendant every three or four days and asked about writing the scripts which were to be in the hands of the Agency a week or so before the broadcast; that she put him off, saying that she did not



originally, he was willing to go ahead on the ground that he was not satisfied with the price offered, but that he had not consulted him as to the price or expenses, "but we are in this thing together, so the reason would be all right with me." That statement that said there would be a 10-20-30 increase - that is, a jump from \$2,000 to \$2,200 a week after the first 20 weeks, and \$2,200 after the first 40 weeks, and not some other figure as all split equally as it won't work to do; that on February 10 defendant handed him a check for \$100 and said, "it is all right; but he replied that he was not sure about the figure, and never said anything to show what the setting from the money and would not say whether or not the check was his last of the money; that various payments of \$100 or multiples thereof representing \$2,000 were made to him at irregular intervals from January 10 to and including June 10, purporting to cover the period from January 27 to June 7, which he received as covering the entire of the profits during that period. Defendant denied having had the conversation testified to by Plaintiff; and that she never told Plaintiff she was getting more than \$100 a week for the show, and knew that she made payments to Plaintiff as salary at the rate of \$100 a week for his services as an employee in writing copy; that she had to delay the first payment until she received the first remittance from the show; that the last payment was made after she discovered Plaintiff because he was not willing to wait.

Plaintiff testified that in the interval between the sale of the show and the time it was put on the air he was delayed every three or four days and asked about writing the copy which were to be in the hands of the show, a week or so before the broadcast; that she put him off, saying that she did not

have time to discuss them but would let him know; that about January 20 he again offered to write some of the scripts and she replied, "Well, the ideas have not jelled enough, and I just don't feel that I can pass them on or let you take them over." Defendant testified that plaintiff talked to her a number of times between the sale of the show and January 25, 1937, and wanted to discuss plots and prepare scripts; that it is the customary practice in writing a show of this character to prepare a daily plot ahead and then to base the story on the daily plot; that based on the tentative outline of the show, she prepared synopses of the daily episodes, blocking them out in squares about a week ahead; that she did not give any of these plots or daily squares to plaintiff nor discuss any of the daily plotting with him at any time, other than plaintiff's exhibit 18. This exhibit, prepared by plaintiff, was a blocking out of daily episodes in squares covering the daily broadcast for the first week of the show (episodes 2, 3, 4 and 5 ), discussed by plaintiff and defendant in the early part of October, and squares covering 15 additional episodes prepared by plaintiff while defendant was on her Caribbean cruise and at which defendant says she merely glanced; these were never discussed. Plaintiff testified, and defendant does not dispute him, that he could never get a conference with her to lay the plot; he further testified that without the plot any writing that he would do would be absolutely superfluous and idiotic; that they were to plot the thing together as they did on the audition script and then he was to write it and she would edit it or make any change she saw fit, and without collaboration on the plot there was not anything he could do without just wasting a lot of time; that he could not write a script which would fit into the program which was developed without him. The only



have time to discuss this but would let him know; that about January 20 he again offered to write some of the articles and the reply, "Well, the time have not fallen away, but I just don't feel that I can spare time on an item you take over." Defendant testified that Plaintiff failed to pay a number of times between the date of the offer and January 20, 1937, and wanted to discuss this and the other articles; that it is the customary practice in writing a book or other literature to prepare a daily plot sheet and then to base the story on the daily plot; that based on the tentative outline of the plot, the prepared synopsis of the daily episodes, Plaintiff failed to in answer about a week later; that he did not give any of these plots or daily episodes to Plaintiff nor discuss any of the daily plotting with him at any time, other than Plaintiff's exhibit 1A. This exhibit, prepared by Plaintiff, was a plot sheet out of daily episodes in answer covering the daily broadcast for the first week of the radio (October 1, 2, 3 and 4), discussed by Plaintiff and Defendant in the early part of October, and answer covering the additional episodes prepared by Plaintiff while Defendant was on her 60th birthday cruise and at which Defendant says she merely glanced; these were never discussed. Plaintiff testified, and Defendant does not dispute this, that he could never get a conference with her to lay the plot; he further testified that without the plot any writing that he would do would be absolutely unsatisfactory and that they were to plot the thing together as they did on the earlier script and then he was to write it and she would edit it or make any change she saw fit, and without collaboration on the plot there was not anything he could do without just waiting a lot of time; that he would not write a script which would fit into the program which was developed without him. The only

13.

writing plaintiff did, except for merchandise "give aways," after November 30 when the audition script was completed by addition of the revised flash, was episodes 12 and 38, and the Circus script. Episode 12 was sent to the Agency January 21 and broadcast February 9; plaintiff says it was written to fit in with the plan of the plot; defendant eliminated the Swedish dialect in which plaintiff had written it, but made no other material change. Episode 38 was broadcast March 17; plaintiff testified that it was written at defendant's request according to the plot outlined by her; that a few days before the broadcast defendant told him that the script was fine and she surely did not have to do much to it. She admits sending him the revised script with a note attached saying "It is coming along swell. However, long speeches take too long to reach the crux of a situation. But you got something there, mister." The Circus episode was a voluntary contribution by plaintiff for use when a circus came to town. It was never used. No writing was done by plaintiff after March 15, and on March 19 defendant ceased sending him mimeographed copies of the daily scripts for the broadcasts. The last script sent him was broadcast April 1. Payments continued for practically three months after plaintiff ceased writing.

The only expression of dissatisfaction with plaintiff's work and contribution to the program made by defendant before terminating her relations with plaintiff was a complaint said to have been made when they met in California while on vacation in the latter part of March 1937 when she told plaintiff that he was not making the kind of progress she had hoped he would make. He denies this conversation. Defendant further testified that in the middle of June she called him on the phone and told him she was not getting any return for the \$100 a week she was paying him and could not retain him as a writer; that



12.

with Plaintiff did, except for some minor changes, after November 30 when the addition of the addition of the revised draft, was reflected in the 12, and the Director's report. Plaintiff 12 was sent to the Agency January 31 and broadcast February 1; Plaintiff says it was written to fit in with the plan of the plot; Defendant 12, Plaintiff the revised draft in which Plaintiff had written 10, had made no other material changes. Plaintiff 12 was broadcast March 14; Plaintiff testified that it was written at Plaintiff's request according to the plot outlined by 12; that a few days before the broadcast Defendant told him that the words and time and the Agency did not have to read to 12. The Agency sending him the revised script with a note attached saying "It is coming along well. However, long passages have too long to reach the ears of a situation, but you got some-thing there, later." The Agency episode was a voluntary contribution by Plaintiff for use when a crisis came to pass. It was never used. No writing was done by Plaintiff after March 14, and on March 16 Defendant ceased sending him scripts and copies of the daily scripts for the broadcast. The last script sent him was broadcast April 1. Defendant continued for practically three months after Plaintiff ceased writing. The only expression of dissatisfaction with Plaintiff's work and contribution to the program was by Defendant before terminating his relations with Plaintiff as a consultant and to have been made when they met in Baltimore while on vacation in the latter part of March 1953 when the Plaintiff said he was not writing the kind of program and had hoped he would make. He denied this conversation. Defendant further testified that in the middle of June she called him on the phone and told him she was not getting any return for the \$100 a week she was paying him and could not retain him as a writer; that

14.

while he was very willing to write, he did not seem to be able to; she had not had very many contributions from him; that he had all the outlines; that she had to call a halt because she was paying out money for work she was doing; that a few days later - June 23 - she paid him \$300 covering the back-pay he had coming. Plaintiff denies this conversation but testified to a conversation in June or July, after the last payment of \$300, while driving defendant home from a dinner at the Edgewater Beach Hotel in which defendant said she was sorry the collaboration could not work out, and that he replied that defendant had suddenly decided to do all the writing and it would be only a matter of time before she would say he was not entitled to even a small share of his rights in the show because he would do none of the work; that he was ready, willing and able, as he had always been, to do the work and was going to see that he got his share; that she replied that the collaboration could not work out; that she would see that he got his money but (that she) had to go along alone. Saturday, July 24, 1937, plaintiff sent defendant by registered mail a letter dated June 22nd referring to a telephone conversation of a few days before in which defendant said definitely that he was to have no share in the show. In this letter plaintiff insisted upon his half interest in the show, saying: "You \*\*\* suggested that we collaborate on The Goog Samaritan." "You then said that you would \*\*\* ask \$350 a week for the scripts and my share would be half." "I had not been consulted about the price, even though I had done all the work up to that time (sale of the show) and had a half interest in the show." "Were we not to go on a 50-50 basis?" "I am not relinquishing my part ownership in The Guiding Light." He says this letter, written on June



11.

While he was very ill, he did not seem to be able to; he had not had very much conversation from him; that he had all the outlines; that was all he had; the newspaper was saying that only for the day; that a few days later - June 22 - was said to be covering the day-long meeting, finally decided the conversation but failed to a conversation in June or July, after the last meeting of 1900, while having a meeting from a dinner at the Hotel de Ville in which the meeting was the way to the conversation could not have been, and that he replied that he had not decided to do all the writing and it would be only a matter of time before he would say he was not satisfied to even a small extent of his rights in the time because he was to have of the work; that he was ready, willing and able, as he had always been, to do the work and was going to see that he got his share; that he replied that the conversation could not work out; that he would see that he got his money out (that was) and to go along alone. Saturday, July 22, 1900, finally sent a letter by registered mail a letter dated June 22nd referring to a telephone conversation of a few days before in which he had sent said definitely that he was to have no share in the show. In this letter Shattuck informed him that he had in the show, saying: "I am not sure that we could not on the last summer." "You have said that you would not ask \$500 a year for the rights and my share would be half." "I had not been thinking about the price, even though I had done all the work in the time (June or July) and had a half interest in the show." "There was not to be on a 50-50 basis." "I am not willing to give ownership in the show to you." He said this letter, written on June

15.

22nd, was withheld when the payment of \$300 was made the next day, and mailed later when no further payments were made. It was received and receipted for Monday, July 26. Defendant says she read it that day but never discussed it with plaintiff at any time, and never knew until suit was brought that plaintiff claimed an interest in the show. She was at the N. B. C. studio that morning, playing the role of Mother Moran in Today's Children. Plaintiff testified that after the broadcast she came into his office and they discussed the letter. Plaintiff testified without contradiction that after his talk with defendant, Taylor of the Agency came into plaintiff's office; that plaintiff told Taylor of the partnership and that he had written the audition script and the presentation and had done 99 per cent of the work up to the time it got the interest of the Agency; that defendant then decided to push him out of the picture and had refused to discuss the plot with him or permit him to write; that Taylor replied that he could never fathom plaintiff's connection with the show; that he, Taylor, wanted to talk about the plot of the show; that they had sensed down in New York that it had taken <sup>a</sup> on/different flavor and that he had told defendant just that morning that they would have to go back to the melting-pot idea which they liked so well in the beginning and which characters seemed to have dropped out of the plot, and she didn't like it very much. Plaintiff and defendant agree that following an appointment made by plaintiff they had dinner at the Kungsholm restaurant on Rush street in March 1938, where they discussed the breaking of their relations, but give a different account of the discussion. This was their last conversation. The last communication between them was plaintiff's letter of





December 7, 1938 to defendant in California. This letter related to the broadcast of December 5th and said: "If you need any further assistance in the development of my plot or in the writing of scripts, I, as you know and have always known, am always ready, willing, and able to do my share of the work in connection with our show 'The Guiding Light.' In spite of the fact that you have acted most dishonorably, I wish you - just for old-time's sake - a most pleasant holiday season." Defendant did not reply.

This extended recital of the evidence is necessary because the primary question presented is one of fact, the decision of which rests largely upon which of the two principal opposing witnesses - plaintiff and defendant - is the more credible. The master reported: "After observing the manner and conduct of the plaintiff and the defendant while appearing as witnesses, and considering all of the circumstances which go to make up the logic of the events in question, I have concluded that the testimony of the plaintiff is to be accepted over that of the defendant. A major factor in arriving at this conclusion was the manner in which the plaintiff survived a searching and brilliantly prepared line of cross-examination. Several of the findings which follow in this report are predicated in whole or in part on the above conclusion." In Kesakowski v. Bagdon, 369 Ill. 252, 258, where the trial court overruled the master's report, the court said: "While the rule is that the master's findings on controverted facts do not carry the weight of a jury verdict in a suit where trial by jury is a matter of right, yet such findings are advisory (Stasch v. Stasch, 355 Ill. 581) and thus are entitled to much consideration. The chancellor, in this case, had no better opportunity to judge the credibility





17.

of witnesses than has this court on appeal, and all the facts are open for our consideration." Kasbohm v. Miller, 366 Ill. 484; McKey v. McKean, 384 Ill. 112, 124; Osgood v. Zieve, 388 Ill. 226, 235. In Groome v. Freyn Engineering Co., 374 Ill. 113, 129, where findings of the master as to fraud, etc., approved by the trial court were attacked on appeal, the court said: "It is sufficient to say that upon these questions the master who heard the witnesses was in a better position to determine the weight and credibility of the evidence. There is evidence to support his findings and they will not be disturbed on review."

The credibility of the defendant is impeached. That portion of defendant's sworn answer that the presentation and audition script upon which the sale of the show was made "were so inartificially prepared that it was necessary for defendant to make so many revisions in the same as to amount to a totally new and different presentation and audition script," is shown by the greater weight of evidence, including the defendant's testimony, to be false. Her persistence in testifying that she knew nothing of plaintiff's claim of a half interest in the show until someone told her the present suit had been brought is indefensible in the face of her admission of having received and read plaintiff's letter dated June 22, 1937, and undisputed proof of her receipt of plaintiff's letter of December 7, 1938. Her testimony that she had not replied to or discussed with plaintiff his letter dated June 22, 1937 and received July 26th is strange, if true, but most likely untrue. Particularly so if, as defendant now contends, there was never any thought of a partnership between them. She was in the N. B. C. offices and studios almost daily, and it had been her custom to drop into plaintiff's office after the broadcasts of Today's Children. The charges in the letter directly attacking





18.

her claim to the sole ownership of the show and asserting plaintiff's half interest would hardly have been ignored by her. Of less importance is her statement that the social security tax on the \$2,000 she claims to have paid plaintiff as her employee was paid by the Agency. Her counsel stipulated that no tax was paid by anyone on these payments, although defendant was paying social security taxes on payments to 2 or 3 other employees.

Defendant's counsel attack plaintiff's testimony, charging that on cross-examination he confessed "We never had a definite agreement. She never stated definitely what I was to get out of it.\*\*\* I cannot swear to the accuracy of any of this. \*\*\*\*" and thereby abandoned the claim of an express fifty-fifty partnership which he swore to in his complaint and on direct examination; that this confession was never repudiated by plaintiff. The two statements separated by asterisks in the quotation are separated by 344 pages in the record, relate to different subjects and do not support defendant's contention. The first statement was in answer to an involved question in which the payment of specific sums were incorporated and plaintiff's answer is in harmony with his testimony that he and defendant were to share equally in the profits and that defendant never definitely stated the precise sum he was to get until the payment of \$100 on February 10, 1937, the date given in the question put to plaintiff. On her direct examination defendant in testifying about employing plaintiff did not fix a definite sum to be paid to him. She says she told him "The most I can pay is around \$100." Plaintiff always insisted that the money paid by defendant was received by him as one-half of the profits of the show, and not as payment of a fixed salary or wage. The express agreement to share profits



and claim to the sole ownership of the same as mentioned  
plaintiff's half interest would have been included in  
that of said interest as per agreement that the said  
amount was on the 10,000 and claim to have said plaintiff  
as per the 10,000 was paid by the plaintiff. The defendant admitted  
that he had not paid by check or money order, although  
defendant was paying said money order on account  
to 2 or 3 other persons.  
Defendant's son at about plaintiff's residence, claiming  
that an oral agreement was entered into between the two and a written  
agreement. The money was definitely paid I was to get the  
of it. I cannot recall to the amount of \$100 or more.  
and thereby showed the state of mind of the plaintiff  
plaintiff which he swore to in his complaint and on witness  
examination; that this confession was never repeated by  
plaintiff. The two states he separated by accident in the  
protection and separation of the money in the money  
so different subject and do not support defendant's con-  
fession. The first witness was in room as an involved  
question in which the payment of question was made immediately  
and plaintiff's money is in harmony with his testimony that  
he and defendant were to share equally in the profit and that  
defendant never definitely stated the money was to be  
for until the payment of \$100 on January 10, 1937, and the  
given in the question was to plaintiff. On that date  
examination defendant is testifying about payment of money  
did not fix a definite time to be paid to him. The only one  
told him "The fact I can pay in money later". Plaintiff always  
insisted that the money was paid by defendant and received by him  
as one-half of the profit of the work, and not as payment of  
a fixed salary or wage. The witness agreement to make written

equally was not involved in the question plaintiff was answering. The second statement was made in the course of an extended cross-examination in which defendant's counsel was attempting to compel plaintiff to give his conversations with defendant in reverse order - that is, to give the last statement of the conversation and each preceding statement in order back to the first statement of the conversation. Plaintiff having answered several times that he could give the gist of the conversations but did not know whether he could give them in the right order, said, "I cannot swear to the accuracy of any of this (the order of the statements). It is an utterly unnatural way of thinking." With his conclusion we agree.

Defendant's counsel further contend that it is unreasonable to believe that defendant, with her experience and standing as a writer of radio script, would have entered into a partnership agreement with plaintiff. In determining this question we must not be dazzled by the later success of the defendant. It must be determined in the light of the situation existing in 1936, uninfluenced by subsequent events. Smith v. Farmers' State Bank, 390 Ill. 374, pp. 379 -380. In 1936 defendant had produced and had been connected with one successful day-time serial - Today's Children. She had yet to write her second successful serial. It was uncertain whether she would ever write it. Her attempts with Black Earth and Dear Diary had not succeeded. Up to the time she suggested submitting The Good Samaritan to the Agency as she passed through New York on her vacation trip, not a "nibble of any kind" had been received on the show, and when she asked plaintiff to prepare the presentation she told him "We do not have any client that I know of, but anyway it is a shot in the dark." She reluctantly sat down with plaintiff to plot episodes 2, 3, 4 and 5 before leaving for New York because she did not know



especially was not involved in the question of liability and  
 answering. The second statement was made in the course of  
 an extended cross-examination in which testimony was given  
 was attempted to compel Plaintiff to give his conversation  
 with defendant in reverse order - that is, to give a last  
 statement of the conversation and then proceeding statement  
 in order back to the first statement of the conversation.  
 Plaintiff having answered several times that he could give the  
 list of the conversations but did not know whether he could  
 give them in the right or reverse order, "I am of opinion to the  
 contrary of any of this (the order of the statements). It is  
 an utterly unnatural way of thinking." With this conclusion  
 he gave.

Defendant's counsel further stated that it is  
 unreasonable to believe that defendant, with his experience  
 and standing as a writer of radio scripts, would have entered  
 into a partnership agreement with Plaintiff, in violation  
 of this question we must not be misled by the fact that  
 of the defendant. It must be determined in the light of the  
 situation existing in 1935, and in the light of the  
Smith v. Tamm, 300 Ill. 374, 134 N.E. 254, 1921.  
 In 1935 defendant had proposed and had been connected with one  
 successful copy-right script - "The Millionaire", and yet  
 to write her second successful script. It was uncertain whether  
 she would ever write it. The attempts with "The Millionaire"  
 had failed. She had not succeeded. Up to the time she attempted  
 submitting "The Good Samaritan" to the Agency she was aware  
 that she was on her vacation trip, not a "business of any kind"  
 had been received on the spot, and when she asked Plaintiff to  
 prepare the presentation she told him "he do not have any effect  
 that I know of, but anyway it is a lot in the bank." She  
 reluctantly gave with Plaintiff to let produce it, and  
 and before leaving for New York because she did not know

20.

any reason for it - "just because we are sending down a presentation to an agency does not mean anything." When in New York, on her way to South America, she refused to cancel or delay her trip because she did not know what reaction Procter & Gamble would have to the show.

The agreement as to which plaintiff testified, was made during a period of uncertainty as to the future of the program, at a time when defendant had little interest and little faith in it. All the writing, the presentation and audition script upon which the sale of the show was based was to be and in fact was done by plaintiff. The agreement contemplated only the writing of the scripts, not a package production in which plaintiff was to do all the writing and defendant was merely to edit or supervise his work after they had outlined the plot. The agreement to share the profits equally was only what the law implies, in the absence of an express agreement, when two or more collaborate in producing a literary work. Maurel v. Smith, 220 Fed. 195, affirmed in 271 Fed. 211, 215. The same rule applies in joint adventures (30 Am. Jur., Joint Adventures, sec. 32), and partnerships (40 Am. Jur., Partnership, sec. 113; Uniform Partnership Act, sec. 16.) The trial court and defendant's counsel cite Wicker's arrangement for a one-fifth interest in Today's Children as an argument against plaintiff sharing equally with defendant in the collaboration and production of The Guiding Light. We do not know from the record Wicker's background or qualifications for writingscripts, the nature or extent of his collaboration or when it began. The first acknowledgment of Wicker's interest was made almost two years after the show had been on the air. Manifestly a person might accept a smaller percentage of the profits in collaborating in writing scripts for an established and successful show than in embarking on the promotion and



any reason for it - "Just because we are writing from a newspaper  
 tion to an agency does not mean anything." This in New York,  
 on her way to South America, she told us he would be there  
 her trip because she did not know what position he held  
 people would have to know.

The agreement as to which plaintiff testified, was  
 made during a period of uncertainty as to the future of the  
 program, at a time when defendant had little interest and  
 little faith in it. All the writing, the preparation and sub-  
 scription were done after the sale of the show was made and  
 he and in fact was done by plaintiff. The agreement contemplated  
 only the writing of the article, not a complete production in  
 which plaintiff was to do all the writing and defendant was  
 merely to edit or supervise his work after that and continue  
 the plot. The agreement to cover the profits equally was  
 only that the law implied, in the absence of an express agree-  
 ment, when two or more collaborate in producing a literary  
 work. Smith v. Smith, 120 Fed. 108, affirmed in 271 Fed. 111.  
 216. The same rule applies in joint advertisements (20 Cal. 2d 341,  
 joint inventors, etc. 25), and partnerships (44 Cal. 2d 341,  
 Partnership, etc. 113; Union National Bank, 20 Cal. 2d 341).  
 trial court and defendant's counsel cite Victor's advertisement  
 for a one-third interest in Victor's business as an authority  
 against plaintiff's claim. It is decided in the  
 collaboration and production of the Golden Lane, he is  
 not free from the Victor's business or collaboration  
 for writing the article, the nature or extent of his collaboration  
 or when it began. The first acknowledgment of Victor's interest  
 was made almost two years after the show had been on the air.  
 a plaintiff a person might secure a similar payment of the  
 profits in collaborating in writing articles for an advertisement  
 and successful show than in collaborating on the production

21.

production of a new and unproved program where the risk is great and success is uncertain until some time after the show is on the air. As late as February, 1937 defendant wrote the Agency, "Who knows, The Guiding Light might be in a fog by that time (November, 1937)." Another fact weakening any analogy between Wicker's arrangements and the present case is that in Today's Children, in addition to writing script, defendant took the role of the leading character in the broadcasts. Wicker did not act. In The Guiding Light neither defendant nor plaintiff were actors. Neither plaintiff's alleged inexperience nor the fact that the contract with the Agency was in the name of defendant defeats plaintiff's claim of a partnership. They are merely incidents to be considered with all the evidence. Lyon v. MacQuarrie, 115 P.2d (Cal.) 594.

Plaintiff's theory of an agreement to collaborate in producing scripts with an equal division of the profits and defendant's repudiation of the contract when the possibilities of the show became apparent, is more consistent with the evidence than defendant's theory that all work done by plaintiff prior to the sale of the show - writing the presentation (he having written or supervised the writing of several thousand; she had written none) and the audition script - was done solely for experience in writing scripts under defendant's direction on her promise to employ him if his work proved satisfactory; that after the presentation and audition script were shown to be "so inartificially prepared that it was necessary for defendant to make so many revisions in the same as to amount to a totally new and different presentation and audition script" she employed plaintiff at \$100 a week to write script and paid him for twenty weeks, during which



production of a new and improved product where the risk is great and success is uncertain until some time after the how is on the air. As late as February, 1937 defendant wrote the Agency, "The Agency, The Defendant's Right to be in a log by that time (November, 1937). Defendant had submitted any analysis between plaintiff's advertisement and the product was in fact in 1937. Defendant, in addition to writing to plaintiff, defendant took the role of the leading advertiser in the broadcast. Plaintiff did not say. In the evidence which neither defendant nor plaintiff were aware. Plaintiff's alleged interference was the fact that the court with the Agency was in the case of defendant's alleged Plaintiff's claim of a partnership. They are easily refuted to be considered with all the evidence. Wong v. Macgregor, 112 F.2d (Cal.) 234.

Plaintiff's theory of an agreement to collaborate in producing scripts with an equal division of the profits and defendant's nomination of the plaintiff when the plaintiff of the show became apparent, is more consistent with the evidence than defendant's theory that all work done by plaintiff prior to the sale of the show - writing the advertisement (as having written or supervised the writing of several thousands and had written none) and the defendant's script - was done solely for experience in writing scripts under defendant's direction on her promise to employ him in his work as a writer; that after the production and writing of the script there to be "so intelligibly prepared that it was necessary for defendant to make no copy available in the case as to account to a totally new and different production and addition script" the employed plaintiff at \$100 a week the script and paid him for twenty weeks, during which

22.

time he produced only three scripts; that payment of salary continued three months after he had submitted his last writing; that the only protest that plaintiff "was either unable or unwilling to write scripts of satisfactory quality or quantity" made by defendant before severing her relations with him was made when they met on a vacation more than two months before she ceased paying his salary.

The record supports the findings of the master, and defendant's exceptions to his report should have been overruled. Defendant's counsel, however, argue that even assuming the truth of all the master's findings, plaintiff is not entitled to recover. It is contended by defendant that the master failed to find that plaintiff accepted defendant's offer to collaborate in writing the scripts and share the profits on an equal or fifty-fifty basis. The master expressly found that plaintiff skilfully and competently prepared the presentation and audition script which defendant requested, and that further writing of scripts and collaboration by plaintiff was prevented by defendant. The facts found constitute performance by plaintiff, and this is acceptance of defendant's offer, completing the contract. 12 Am. Jur., Contracts, sec. 42.

It is also contended that any partnership between the parties was terminable at the will of either party and that defendant's acts constituted a dissolution of the supposed partnership ending the matter "unless either of the supposed 'partners' was in possession of 'partnership property' of any value to be accounted for"; that at the time of the alleged dissolution of the partnership there was no partnership property of value. This argument ignores the literary property in the radio show The Guiding Light. Cole v. Phillips H. Lord, Inc., 28 N. Y. S.2d 404; 18 C. J. S., Copyright and Literary Property,



[illegible]

23.

secs. 5, 8. As said in Thanos v. Thanos, 313 Ill. 499, 506, cited by defendant: "Either the act of appellant in declaring the partnership terminated or the act of the appellee in withdrawing from the partnership business was in fact and in law a dissolution of the same. (Blake v. Sweeting, 121 Ill. 67.) Such dissolution of the partnership was not, however, its termination. It continues until the winding up of partnership affairs is completed. In a court of equity a partner who after the dissolution of the partnership carries on the business with the partnership property is liable, at the election of the other partner, to account for the profits thereof, subject to proper allowances. (Karrick v. Hannaman, 168 U. S. 328, 18 Sup. Ct. 135.)"

Another contention is that plaintiff abandoned whatever relation existed between himself and defendant and is guilty of laches. When defendant refused to make further payments plaintiff notified her by letter that he was not relinquishing his "part ownership in The Guiding Light." He brought suit within the five-year limitation period governing actions for accounting on oral contracts. Trustees of Schools v. American Surety Co., 307 Ill. App. 398, and cases cited.

It is further contended that plaintiff cannot recover as he does not come into equity with clean hands, because the alleged partnership was a violation of his obligations to N. B. C. and an attempt to "pass his novice writings off on the sponsors as those of 'the leading day time serial writer'"; that this would have been a fraud and against public policy. If the evidence supported this claim, defendant is in no position to take advantage of it. Groome v. Freyn Engineering Co., 374 Ill. 113, 124-125.

Finally it is urged that the master's findings are of no weight because the master copied verbatim the "findings"





24.

prepared by plaintiff's counsel, citing Fitchburg Steam Engine Co. v. Potter, 211 Ill. 138. This point is wholly without merit and the case cited has no application. At the close of all the evidence the master asked counsel for both parties to submit suggested findings. Plaintiff's counsel submitted less than thirty. Defendant's counsel submitted 83 suggested findings in an 84-page printed brief containing references to the record and argument supporting the findings. The master, finding for the plaintiff, adopted most of his suggested findings, but not all. Criticism of the master's conduct is unwarranted.

The decree is reversed and the cause remanded with directions to overrule defendant's exceptions to the master's report and to proceed in conformity with the views expressed herein.

REVERSED AND REMANDED  
WITH DIRECTIONS.

Matchett, P. J., concurs.  
O'Connor, J., dissents.





43384

WILLIAM D. GORDON,  
Appell e,

v.

EDWIN L. READ,  
Appellant,

CARL H. BORAK and FRANK KATZ  
and RUTH KATZ, Third-party  
Defendants-Appellees.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

3261A.595

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant Read appeals from a judgment for \$1,400 rendered in favor of plaintiff, a real estate broker, on his claim for commissions on the sale to Frank and Ruth Katz of the Clarendon-Montrose Apartments, title to which was held by Read as trustee under a liquidating trust agreement.

In September 1943 Read listed the Clarendon-Montrose property with plaintiff, who was endeavoring to sell other property in which Read was interested; he explained that he held title to the property as trustee, that an offer of \$30,000 in cash would be considered, but that it would have to be approved by the trust managers and submitted to the holders of beneficial interests, 35 per cent of whom could reject the offer. Plaintiff, who had shown other property to Frank Katz without effecting a sale, suggested to him the purchase of the Clarendon-Montrose property; Katz was taken to the premises by an employee of plaintiff, examined the exterior of the building and the interior of several apartments; shortly after the examination of the premises with plaintiff's agent, Katz went alone to make a further examination; he was denied admission to the premises by the



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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 09-07-01 BY 60322

and is also the limit of the sequence  $\{f_n\}$  in the  $L^1$ -norm.

המחיר הממוצע של המכשיר הוא 1,200 ש"ח, ויש לו מחיר מינימלי של 1,000 ש"ח.

... ..

10. 1971. 11. 1971. 12. 1971. 1. 1972. 2. 1972. 3. 1972. 4. 1972. 5. 1972. 6. 1972. 7. 1972. 8. 1972. 9. 1972. 10. 1972. 11. 1972. 12. 1972. 1. 1973. 2. 1973. 3. 1973. 4. 1973. 5. 1973. 6. 1973. 7. 1973. 8. 1973. 9. 1973. 10. 1973. 11. 1973. 12. 1973. 1. 1974. 2. 1974. 3. 1974. 4. 1974. 5. 1974. 6. 1974. 7. 1974. 8. 1974. 9. 1974. 10. 1974. 11. 1974. 12. 1974. 1. 1975. 2. 1975. 3. 1975. 4. 1975. 5. 1975. 6. 1975. 7. 1975. 8. 1975. 9. 1975. 10. 1975. 11. 1975. 12. 1975. 1. 1976. 2. 1976. 3. 1976. 4. 1976. 5. 1976. 6. 1976. 7. 1976. 8. 1976. 9. 1976. 10. 1976. 11. 1976. 12. 1976. 1. 1977. 2. 1977. 3. 1977. 4. 1977. 5. 1977. 6. 1977. 7. 1977. 8. 1977. 9. 1977. 10. 1977. 11. 1977. 12. 1977. 1. 1978. 2. 1978. 3. 1978. 4. 1978. 5. 1978. 6. 1978. 7. 1978. 8. 1978. 9. 1978. 10. 1978. 11. 1978. 12. 1978. 1. 1979. 2. 1979. 3. 1979. 4. 1979. 5. 1979. 6. 1979. 7. 1979. 8. 1979. 9. 1979. 10. 1979. 11. 1979. 12. 1979. 1. 1980. 2. 1980. 3. 1980. 4. 1980. 5. 1980. 6. 1980. 7. 1980. 8. 1980. 9. 1980. 10. 1980. 11. 1980. 12. 1980. 1. 1981. 2. 1981. 3. 1981. 4. 1981. 5. 1981. 6. 1981. 7. 1981. 8. 1981. 9. 1981. 10. 1981. 11. 1981. 12. 1981. 1. 1982. 2. 1982. 3. 1982. 4. 1982. 5. 1982. 6. 1982. 7. 1982. 8. 1982. 9. 1982. 10. 1982. 11. 1982. 12. 1982. 1. 1983. 2. 1983. 3. 1983. 4. 1983. 5. 1983. 6. 1983. 7. 1983. 8. 1983. 9. 1983. 10. 1983. 11. 1983. 12. 1983. 1. 1984. 2. 1984. 3. 1984. 4. 1984. 5. 1984. 6. 1984. 7. 1984. 8. 1984. 9. 1984. 10. 1984. 11. 1984. 12. 1984. 1. 1985. 2. 1985. 3. 1985. 4. 1985. 5. 1985. 6. 1985. 7. 1985. 8. 1985. 9. 1985. 10. 1985. 11. 1985. 12. 1985. 1. 1986. 2. 1986. 3. 1986. 4. 1986. 5. 1986. 6. 1986. 7. 1986. 8. 1986. 9. 1986. 10. 1986. 11. 1986. 12. 1986. 1. 1987. 2. 1987. 3. 1987. 4. 1987. 5. 1987. 6. 1987. 7. 1987. 8. 1987. 9. 1987. 10. 1987. 11. 1987. 12. 1987. 1. 1988. 2. 1988. 3. 1988. 4. 1988. 5. 1988. 6. 1988. 7. 1988. 8. 1988. 9. 1988. 10. 1988. 11. 1988. 12. 1988. 1. 1989. 2. 1989. 3. 1989. 4. 1989. 5. 1989. 6. 1989. 7. 1989. 8. 1989. 9. 1989. 10. 1989. 11. 1989. 12. 1989. 1. 1990. 2. 1990. 3. 1990. 4. 1990. 5. 1990. 6. 1990. 7. 1990. 8. 1990. 9. 1990. 10. 1990. 11. 1990. 12. 1990. 1. 1991. 2. 1991. 3. 1991. 4. 1991. 5. 1991. 6. 1991. 7. 1991. 8. 1991. 9. 1991. 10. 1991. 11. 1991. 12. 1991. 1. 1992. 2. 1992. 3. 1992. 4. 1992. 5. 1992. 6. 1992. 7. 1992. 8. 1992. 9. 1992. 10. 1992. 11. 1992. 12. 1992. 1. 1993. 2. 1993. 3. 1993. 4. 1993. 5. 1993. 6. 1993. 7. 1993. 8. 1993. 9. 1993. 10. 1993. 11. 1993. 12. 1993. 1. 1994. 2. 1994. 3. 1994. 4. 1994. 5. 1994. 6. 1994. 7. 1994. 8. 1994. 9. 1994. 10. 1994. 11. 1994. 12. 1994. 1. 1995. 2. 1995. 3. 1995. 4. 1995. 5. 1995. 6. 1995. 7. 1995. 8. 1995. 9. 1995. 10. 1995. 11. 1995. 12. 1995. 1. 1996. 2. 1996. 3. 1996. 4. 1996. 5. 1996. 6. 1996. 7. 1996. 8. 1996. 9. 1996. 10. 1996. 11. 1996. 12. 1996. 1. 1997. 2. 1997. 3. 1997. 4. 1997. 5. 1997. 6. 1997. 7. 1997. 8. 1997. 9. 1997. 10. 1997. 11. 1997. 12. 1997. 1. 1998. 2. 1998. 3. 1998. 4. 1998. 5. 1998. 6. 1998. 7. 1998. 8. 1998. 9. 1998. 10. 1998. 11. 1998. 12. 1998. 1. 1999. 2. 1999. 3. 1999. 4. 1999. 5. 1999. 6. 1999. 7. 1999. 8. 1999. 9. 1999. 10. 1999. 11. 1999. 12. 1999. 1. 2000. 2. 2000. 3. 2000. 4. 2000. 5. 2000. 6. 2000. 7. 2000. 8. 2000. 9. 2000. 10. 2000. 11. 2000. 12. 2000. 1. 2001. 2. 2001. 3. 2001. 4. 2001. 5. 2001. 6. 2001. 7. 2001. 8. 2001. 9. 2001. 10. 2001. 11. 2001. 12. 2001. 1. 2002. 2. 2002. 3. 2002. 4. 2002. 5. 2002. 6. 2002. 7. 2002. 8. 2002. 9. 2002. 10. 2002. 11. 2002. 12. 2002. 1. 2003. 2. 2003. 3. 2003. 4. 2003. 5. 2003. 6. 2003. 7. 2003. 8. 2003. 9. 2003. 10. 2003. 11. 2003. 12. 2003. 1. 2004. 2. 2004. 3. 2004. 4. 2004. 5. 2004. 6. 2004. 7. 2004. 8. 2004. 9. 2004. 10. 2004. 11. 2004. 12. 2004. 1. 2005. 2. 2005. 3. 2005. 4. 2005. 5. 2005. 6. 2005. 7. 2005. 8. 2005. 9. 2005. 10. 2005. 11. 2005. 12. 2005. 1. 2006. 2. 2006. 3. 2006. 4. 2006. 5. 2006. 6. 2006. 7. 2006. 8. 2006. 9. 2006. 10. 2006. 11. 2006. 12. 2006. 1. 2007. 2. 2007. 3. 2007. 4. 2007. 5. 2007. 6. 2007. 7. 2007. 8. 2007. 9. 2007. 10. 2007. 11. 2007. 12. 2007. 1. 2008. 2. 2008. 3. 2008. 4. 2008. 5. 2008. 6. 2008. 7. 2008. 8. 20

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U.S. DEPARTMENT OF JUSTICE

[illegible][illegible]

Letter to Volodymyr and Yurii from 1940

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1. What is the purpose of the study?

... of ... ..

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janitor, who referred him to the defendant Borak, a real estate broker who had the management of the building; Katz went to see Borak. There is a conflict in the evidence as to whether Borak advised Katz that purchase of the premises could only be effected through himself. About this time Katz advised plaintiff that he was not interested in buying the Clarendon-Montrose building or any other building at that time, and plaintiff says "That is when we dropped it."

On October 7, 1943 plaintiff advised Read by letter that he had submitted the property to Katz on September 20; that Katz and his wife had examined the premises in company with plaintiff's agent on September 27th and on the day the letter was dated Katz had called at plaintiff's office and advised plaintiff that he would make an offer on the property within a few days. Under date of October 11, 1943 Read acknowledged receipt of plaintiff's letter and stated: "I am advised by Mr. Carl H. Borak that this property was shown to Mr. Katz by him several months ago altho no sale had been consummated. This will also advise you that I cannot recognize your letter." There is no evidence to support the statement that Borak had previously shown the property to Katz. Katz testified that he first saw Borak after plaintiff's agent had shown him the premises; that he then told Borak that plaintiff had submitted the property to him. Borak testified that Katz came into his office about October 10, 1943. It does appear without contradiction that Borak owned a small number of beneficial interests in the liquidation trust; that he was active in the organization of the trust, obtaining an initial loan of \$2,500 to provide necessary funds for its organization and later procuring a \$15,000 mortgage on the premises. He managed the property under the trustee from the beginning of





3.

the trust. Under date of October 26, 1943 Borak submitted to Read an offer dated October 25, 1943, signed by Frank Katz and Ruth Katz, his wife, to purchase the property for \$30,000, the offer being conditioned upon the buyer's securing "a first mortgage trust deed loan of Fifteen Thousand Dollars (\$15,000) without the payment of commission therefor, said loan to be for not more than fifteen (15) years, with payments to completely amortize itself over the life of the loan, at 4 1/2% interest." By the early part of December Borak had obtained commitment for the loan of \$15,000 upon the terms stated in the offer to purchase. Thereafter, under date of December 18, 1943, an unconditional offer to purchase the premises for \$30,000 signed by Katz and his wife was submitted to Read. This offer contained the recital that "The only broker in any way involved in this offer is Carl H. Borak of 33 North LaSalle Street." Appended to the offer was an agreement signed by Borak reciting that "The undersigned, a licensed real estate broker, represents that he is the only broker interested in the foregoing offer and agrees to indemnify and save the seller harmless from claims of any other broker in connection with said offer." The purchase of the property was consummated in the early part of 1944 and the full commission of \$1,500 paid by the trust estate to Borak.

After the institution of plaintiff's action defendant Read made Borak and the purchasers of the property parties to the action, asserting his claim against the purchasers upon their representation in their offer that Borak was the only broker involved, and against Borak upon his representation that he was the only broker involved and his agreement to indemnify Read from claims of any other broker. On these claims judgment was entered in favor of the purchasers and





4.

against Borak for the sum of \$1,400. No appeal was taken.

Plaintiff was authorized by Read to find a purchaser for the premises; he submitted the property to Frank and Ruth Katz, who subsequently purchased it; he promptly notified Read of his submission of the property to the purchasers, and Read, taking the false position that Borak (his associate in the trust) had previously shown the property to the purchasers, refused to recognize plaintiff in the transaction and paid the commission to Borak. Plaintiff is, nevertheless, entitled to his commission. Rigdon v. More, 226 Ill. 382; Hafner v. Herren, 165 Ill. 242; Wilson v. Mason, 158 Ill. 304; Cowan v. Day, 156 Ill. App. 105; Fifer v. Lewis, 183 Ill. App. 349.

The judgment is affirmed.

AF IRMED.

Matchett, P. J., and O'Connor, J., concur.





43396

In Re: ESTATE OF EDWARD J. O'HARE,  
Deceased.

GEORGE REMUS,  
Claimant-Appellant,

v.

THE NORTHERN TRUST COMPANY,  
Executor of the Estate of Edward  
J. O'Hare, Deceased,  
Appellee.

APPEAL FROM  
CIRCUIT COURT,  
COOK COUNTY.

325 I.A. 596

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Claimant (Remus) appeals from a judgment of the trial court denying his claim against the estate of the deceased (O'Hare).

The original claim for \$196,700 filed in the Probate court of Cook county was based upon an alleged verbal account stated July 31, 1923 in the sum of \$208,200 on which \$11,500 was paid. This claim was denied in the Probate court. On appeal taken to the Circuit court - the trial there before the court without a jury - the claim was again denied. On appeal to this court (323 Ill. App. (abst.) 71) the judgment was reversed because of an erroneous ruling in respect to evidence offered by claimant. On remandment a second trial was had in the Circuit court before another trial judge without a jury, resulting in a similar judgment denying the claim.

On the last trial Remus filed an amended statement of claim for \$199,200, balance due on an account stated in the sum of \$208,200 "reduced to writing in an agreement signed by Edward J. O'Hare (the deceased) on July 31, 1923." The alleged original agreement has never been before the court. An alleged photostatic copy dated July 31, 1923 at St. Louis, Mo., recites an agreement of O'Hare to pay to Remus \$208,200 at the rate of \$10,000 each



In the County of ...

...

...

3801A.200

...

Plaintiff (hereinafter referred to as "Plaintiff") ...  
 denying his claim against the estate of ...  
 The original claim for ...  
 of Cook County was based upon an alleged ...  
 July 21, 1923 is the one of ...  
 This claim was denied in the ...  
 the Circuit Court - the trial ...  
 July - the claim was ...  
 Ill. App. (West.) VI the judgment was ...  
 erroneous ruling in respect to ...  
 remanded a second trial was had in the ...  
 another trial ...  
 denying the claim.

In the last trial ...  
 for \$12,200, balance due on an account ...  
 \$200,000 "treated to ...  
 there (the ...)  
 judgment has never been ...  
 copy dated July 21, 1923 at ...  
 of claim to pay to ...

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year for a period of 19 years thereafter, and \$18,200 on the 20th year from the date of the instrument without interest, and that "This agreement is evidenced by (891) eight hundred ninety one barrels of whiskey stored in the warehouse of the Jack Daniels distillery at St. Louis, Missouri, certificated for which I hereby tender said George Remus (claimant) as collateral security for said above amount of moneys due him. If the aforesaid amount can be paid by me before maturity I shall use my best efforts to do so."

Remus claims, and there is testimony to support the claim, that in 1925 when O'Hare was on trial in the Federal court at Indianapolis for conspiracy to violate the prohibition laws in the handling and disposition of the whiskey covered by the certificated held as collateral, O'Hare wanted the original agreement between himself and Remus in his possession until after the conspiracy case, and that Miss Watson, representing Remus, delivered it to O'Hare after endorsing on it two payments of \$2,500 each and procuring the photostatic copy of the agreement and endorsements relied upon and received in evidence in the present litigation. No witness testifies to having had or seen the original after its alleged delivery to O'Hare. A witness called by Remus testified that in 1935 Remus asked O'Hare for the original note, saying that O'Hare had promised to give it back but had not done so and that all he (Remus) had was a photostatic copy; that O'Hare replied that he had given the note to his lawyers and would try to get it, "but that photostatic copy is as good as the original between you and I."

The genuineness of the signature to the agreement is attacked. Defendant introduced the testimony of persons claiming to be familiar with O'Hare's signature who testified that the signature was not O'Hare's. A handwriting expert called by defendant stated that in his opinion the signature was a forgery. Plaintiff met this testimony with the testimony of a handwriting expert who was of the





3.

opinion the signature was genuine, the testimony of witnesses who claim to have seen O'Hare sign the agreement, and a witness who claimed to be familiar with O'Hare's signature and was of the opinion that the signature was genuine. Claimant also produced witnesses who testified to statements made by O'Hare respecting his obligation on the agreement and to payments made by him on account. These witnesses were long-time friends of Remus and had been associated with him in some of his various transactions. They were casual witnesses to the transactions or statements about which they testified and, with one exception, without apparent interest in the matters occurring within their sight or hearing. They were not interrogated or called upon to testify concerning these matters until a number of years thereafter. Some of the witnesses testified on several of the hearings, and with these witnesses a progressive improvement in memory to meet the needs of claimant's case is noted. All the matters testified to were transactions or statements of a dead man, with none present other than the deceased, Remus and his witnesses. Testimony of this nature must be closely scrutinized. It is generally regarded with suspicion. If false it is safe perjury. As this court said in In re: Estate of Hanson, 304 Ill. App. 157, 162: "Extrajudicial admissions of a dead man are the weakest of all evidence. They cannot be contradicted. No fear of detection in false swearing impends over the witness. In most instances such testimony is scarcely worthy of consideration." To like effect are Keshner v. Keshner, 376 Ill. 354; Meggison v. Meggison, 367 Ill. 168; Delee v. Leahy, 278 Ill. App. 178.

There have been three trials before three different trial judges. All have denied the claim. It is true that one judgment was reversed because of the error in excluding evidence offered by Remus. The judgment now before us should not be reversed unless





4.

it is palpably wrong. Farley v. Mitchell, 282 Ill. App. 555; Standard Acc. Ins. Co. v. Mueller, 291 Ill. App. 56. We cannot say that the finding of the trial court is contrary to the evidence. To the layman a comparison of the signature to the agreement relied upon with the admittedly genuine signatures of O'Hare in the exhibits before us tends to support the conclusion of the handwriting expert who declared the signature in question to be a forgery. In the original claim filed in the Probate court, as amplified by order of the court for more particulars, the alleged account stated is said to be verbal. The amended statement filed on the last trial bases the account stated on the alleged agreement in evidence. Several years after the making of the alleged agreement Remus filed an affidavit with the Government in an effort to adjust his income taxes. In this affidavit he does not list this note as an asset. Objection made to the admission of this affidavit is not tenable. The affidavit did not relate to any compromise of the claim before us, and the cases cited are not applicable. Admissions against interest by a party to litigation may be received without previously examining the litigant as to such admissions. Brown v. Calumet River Ry. Co., 125 Ill. 600. In this affidavit in evidence Remus failed to list the obligation of O'Hare among his assets. When called as a witness he sought to explain the omission by saying that he then considered the obligation worthless. However, he listed as being without value the certificates for the whiskey, which he claims to have held as collateral for the note, and failed to list the worthless obligation among the losses claimed by him. We deem further recital of the testimony unnecessary.

The judgment of the trial court is affirmed.

AFFIRMED.

Mathett, P.J., and O'Connor, J., concur.





43410

VALENTINE KUBISZEWSKI,  
Appellant,

v.

EDWARD LYNCH,  
Appellee.

37 A  
APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

326 I.A. 596<sup>2</sup>

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment in a forcible detainer action in favor of the defendant, who has not followed the appeal.

It appears from the record that defendant was a month to month tenant of an apartment on the first floor at 1801 south Troy street, Chicago, belonging to plaintiff; on October 24, 1944 the Rent Director of the Office of Price Administration of the Chicago Defense-Rental Area issued to plaintiff a certificate relating to eviction authorizing him to bring action for eviction of defendant as tenant of the apartment; thereafter plaintiff served the necessary 30 day notice of termination of tenancy as of December 31, 1944, and on January 5, 1945 instituted suit for possession. On the trial, over objection of plaintiff, defendant was permitted to introduce evidence attacking the good faith of the plaintiff in asking eviction of defendant so that the premises might be occupied by plaintiff's daughter. This was error, as held by this court in Bochner v. Rosen, 326 Ill. App. 382, citing United States v. Hansen, 52 F. Supp. 693, and Jones v. Shields, 146 P.2d (Cal. App.) 735.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J, concur.



1935

ALBERT E. BROWN, JR.

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ALBERT E. BROWN, JR.

43439

PEOPLE OF THE STATE OF ILLINOIS,  
Defendant in Error,

v.

STANLEY SUMOSKI,  
Plaintiff in Error.

ERROR TO CRIMINAL COURT  
COOK COUNTY.

326 I.A. 597

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT

Defendant appeals from a judgment finding him guilty of petit larceny and sentencing him to one year in the House of Correction and to pay a fine of \$100 and no costs.

The case was tried before the court on testimony of witnesses and a stipulation as to the testimony of certain witnesses which conclusively establishes the larceny of property in the custody of the Mechanics Overall Laundry and Rental Company, named as owner of the property in the indictment. This was sufficient proof of ownership of the property, although the title thereto was in another corporation or person. People v. Fitzgerald, 297 Ill. 264; People v. Kreisler, 381 Ill. 453, 457; People v. Dunsworth, 323 Ill. App. 470, 473-4.

No objection was made to the competency of the evidence stated in the stipulation, and no right to make such objection was preserved in the stipulation. The facts incorporated therein being sufficient to establish guilt, we need not consider defendant's complaint as to the alleged error in denying his motion to suppress certain other evidence or the admission of other evidence said to have been improperly admitted. The only error we find in the record is in the finding as to the value of the property, which should have been greatly in excess of the value of \$14 found by the court. Defendant, having profited by this error, makes no objection.

The judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.



STATE OF ILLINOIS,  
County of Cook,

v.

JOSEPH A. BROWN,  
Defendant.

IN SENATE  
JANUARY 10, 1904

3261A.597

THE JURY HAS RETURNED THE VERDICT IN THE COURT

Defendant appeals from a judgment granting his bill

of quiet title and restoring him to one year in the house

of correction and to pay a fine of \$100 and no costs.

The case was tried before the court on testimony of

witnesses and a stipulation as to the testimony of certain

witnesses which conclusively established the facts of the

case to the satisfaction of the learned counsel for the

defendant, and as owner of the property in the house

rent. This was sufficient proof of ownership of the property,

although the title thereto was in another corporation or person.

People v. Brown, 227 Ill. 504; People v. Brown, 201

Ill. App. 437; People v. Brown, 227 Ill. App. 470, 471-2.

No objection was made to the competency of the evidence

stated in the stipulation, and no right to cross-examine

was reserved in the stipulation. The facts established

therein being sufficient to establish title, we need not con-

sider defendant's contention as to the alleged error in granting

his motion to suppress certain other evidence by the admission

of other evidence said to have been improperly admitted. The

only error we find in the record is in the finding as to the value

of the property, which should have been granted in favor of

the value of the land by the court. Defendant, being satisfied

by this error, makes no objection.

The judgment is affirmed.

ATTORNEY.

Respectfully, J. A. Brown, J. A. Brown, J. A. Brown.

43468

AMERICAN NATIONAL BANK & TRUST  
COMPANY OF CHICAGO, as Trustee  
under a trust agreement dated  
May 9, 1933, known as Trust  
No. 1583,

Appellee,

v.

THE NATIONAL MINERAL COMPANY,  
an Illinois corporation,  
Appellant.

APPEAL FROM  
CIRCUIT COURT  
COOK COUNTY.

326 I.A. 5972

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a summary judgment in the sum of \$2,292.22 entered against it in an action for rent due at the institution of suit under a written lease between plaintiff and defendant dated December 20, 1943, covering premises in the City of Chicago to be occupied solely for storage, warehouse and manufacturing purposes for a term from March 1, 1944 to February 28, 1947.

By special provision defendant lessee was given permission to make certain alterations to the front and rear entrance to the demised premises substantially in accordance with blue prints made a part of the lease by reference, the cost of such alterations not exceeding the sum of \$2,000 to be paid by plaintiff lessor. It was further provided that on or before March 15, 1944 plaintiff would place defendant in possession of a portion of the premises and in possession of the remainder of the premises on or before April 1, 1944; that rentals should be prorated and begin as to the part first occupied as of March 15, and as to the remainder April 1. Under date of March 14, 1944 plaintiff advised defendant that the first portion of the premises was ready for occupancy. On March 19th defendant acknowledged receipt of this notice,



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
In re: [illegible]  
[illegible]  
[illegible]

v.

THE NATIONAL BUREAU OF INVESTIGATION  
[illegible]  
[illegible]

UNITED STATES  
DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

32614.507

Mr. Justice William Rutledge, Jr., District Judge

Defendant's motion for summary judgment is denied.

On March 1, 1944, the defendant, The National Bureau of Investigation, filed a motion for summary judgment in this case. The motion is based on the fact that the plaintiff, [illegible], has failed to establish a prima facie case of liability. The defendant claims that the plaintiff's motion is premature and that the case should be decided on the merits. The court finds that the defendant's motion is premature and that the case should be decided on the merits.

By special provision defendant issues are given priority.

In order to make certain allegations to the Court and to the jury, the defendant has introduced evidence which is substantially in accordance with the facts as set forth in the complaint. The cost of such allegations has been paid by the defendant. It is further stated that on or before March 15, 1944, plaintiff paid the defendant in possession of a portion of the premises and in possession of the remainder of the premises on or before April 1, 1944. That plaintiff should be granted and paid as to the first occupied as of March 15, 1944, and as to the remainder April 1, 1944. In the case of March 15, 1944, plaintiff failed to establish that the first portion of the premises was used for business. The March 15th defendant acknowledged receipt of this motion.

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stated that the entrance to the premises was too small for defendant's truck and therefore plaintiff was "unable to give the possession contemplated by and necessary to comply with the lease, whether because of a mistake of fact on your part, mutual mistake or other reason," and stating that defendant was obliged to set aside the lease on the grounds stated but offering to consider a new lease upon certain alterations being made by plaintiff. As a result of negotiations a further agreement between the parties was entered into on April 19, 1944, providing that defendant "may take possession of the premises at 5050 Broadway without waiver of and without prejudice to the respective rights of The American National Bank & Trust No. 1583 and of The National Mineral Company," and defendant on that day entered into possession of the premises but made no payment of rent as provided in the lease. On June 16, 1944, without surrendering possession, defendant filed its complaint in the Superior court of Cook county seeking to have the lease declared canceled and of no effect and offering to pay the reasonable value of the premises until defendant removed from them. July 14, 1944 plaintiff instituted the present action for rent and immediately made a motion for summary judgment. Defendant charges that this motion was entered prematurely and makes certain objections to the procedure in respect to the motion. We need not consider these objections as the matter was continued from time to time and final disposition of the motion was not made until October 20, 1944, after defendant was given ample opportunity to make its defense to the motion and also apply to the Superior court for an injunction restraining this action to collect rent during the pendency of defendant's suit to cancel the lease. Defendant's application for injunction was denied, White v. Y. M. C. A., 223 Ill. 526, 530.

No question of fact is involved. Plaintiff's right to





3.

judgment is based solely upon the proposition of law, as it contends, that defendant having taken possession under the lease, it must pay the rent stipulated therein. Defendant contends that under the agreement of April 19, 1944, providing that defendant take possession without waiver of and without prejudice to the respective rights of plaintiff and defendant, it is entitled to remain in possession without payment of rent and litigate its right to cancel the lease. It is the established rule that a tenant in possession under a lease is obligated to pay the rent provided by the lease, subject however to his right to recoup in the action for rent such damages as he may have sustained by reason of the lessor's failure to comply with his covenants in the lease. Rubens v. Hill, 213 Ill. 523. Defendant does not seek to recoup any damages. Its affidavit in opposition to the summary judgment sets up its alleged right to cancel the lease and the agreement of April 19, 1944. It endeavors to cancel the lease because of impossibility of performance arising out of the illegality under the ordinances of the city of the proposed alterations which it was permitted to make, citing in support of its right to rescind because of illegality of performance, Fisher v. U. S. Fidelity & Guaranty Co., 313 Ill. App. 66. Restoration of the status quo is generally required as a condition of obtaining cancellation of an agreement. 9 Am. Jur., Cancellation of Instruments, sec. 39. The agreement of April 19, 1944 is practically meaningless. It reserves the rights of the plaintiff as well as the rights of the defendant. Among the rights of the plaintiff reserved by the agreement was the right to receive the rent stipulated in the agreement, subject only to the defendant's right to recoup.

No substantial triable issues of fact being raised by defendant's affidavit of defense, the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.



Judgment is given solely upon the proposition of law, it is  
 contended, that defendant having waived his right to  
 raise, it will not be considered. Defendant  
 contends that under the agreement of April 15, 1904, providing  
 that defendant take possession within sixty days of the signing  
 of the agreement, the plaintiff is entitled to possession,  
 it is entitled to possession within sixty days of the signing  
 and I think the right is given. The issue is whether  
 it is a condition that a tenant is given, and under a lease is entitled  
 to pay the rent provided by the lease, unless he is  
 right to recover in the action for rent and interest on the  
 sum advanced by reason of the lease. Defendant is entitled  
 with his covenant in the lease, James v. Hill, 103 Ill. 207.  
 Defendant does not seek to recover the interest on the  
 in opposition to the amount advanced. There is no right  
 to cancel the lease and the agreement of April 15, 1904, is  
 endeavor to cancel the lease because of illegality of the  
 to recover the right of the plaintiff under the agreement of  
 the city of the proposed agreement with it and defendant is  
 here, citing in support of its right to recover interest on  
Illegality of performance, Fisher v. Hill, 103 Ill. 207.  
 213 Ill. App. 48. Defendant of the lease was in possession  
 required as a condition of certain conditions of an agreement.  
 213 Ill. App. 48, cancellation of lease, 213 Ill. App. 48.  
 of April 15, 1904 is practically nullified. It provides for  
 rights of the plaintiff as well as the right of the defendant.  
 Among the rights of the plaintiff reserved by the agreement was  
 the right to receive the rent stipulated in the agreement, which  
 only to the defendant's right to recover.  
 No essential change takes place on the date of the  
 defendant's affidavit of defense, the plaintiff is entitled.

42861

ESTHER HOPPE,  
Appellee,

v.

YELLOW CAB COMPANY, a Corpora-  
tion,  
Appellant.

APPEAL FROM  
SUPERIOR COURT,  
COOK COUNTY.

40  
326 I.A. 598

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover damages for personal injuries claimed to have been sustained by her through the negligence of the driver of a taxicab in which she was riding as a passenger. There was a jury trial, a verdict and judgment in plaintiff's favor for \$500 and defendant appeals.

The record discloses that on April 25, 1941, plaintiff, a woman about 42 years of age, with her husband, lived at 5535 Winthrop avenue, Chicago, which street is about 1100 west. That near her home she got a taxicab to take her to her husband's place of business, which was at Loomis and Harrison streets. Loomis street runs north and south and is about 1400 west, and as the taxicab, going south, was crossing Monroe street, an east and west street, there was a collision between the cab and an automobile being driven west in Monroe street by H. A. Lathrop, whose correct name plaintiff says was Roy W. Lathrop. Lathrop was made a party defendant but was not served and did not appear on the trial. Plaintiff was thrown from her seat and struck her knee and shin, which were the injuries for which she sues.

There is much confusion in the record. The facts in this case are very simple but it is difficult to find out what they are from the briefs or record.



132

- END -

Received 10/10/2017; revised 11/10/2017; accepted 12/10/2017.

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Approved: \_\_\_\_\_ Date: \_\_\_\_\_

100-443887-1000

you will find it in the list of names of the persons who are

THE UNIVERSITY OF CHICAGO

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The complaint alleged that plaintiff was riding south in a taxicab on Tripp avenue at its intersection with Monroe street but there is no evidence that the streets intersect. It was also alleged that the automobile which collided with the taxicab was being driven east in Monroe street, but the testimony of plaintiff is that it was being driven west. There is much other confusion in the record but we think it would serve no purpose to mention for we are clearly of opinion that the taxicab was being driven south in Loomis street and the collision occurred as it was crossing Monroe street.

Plaintiff testified that the taxi driver did not slow down or stop as he was about to cross Monroe street but that when the cab was at about the middle of that street the driver applied his brakes, suddenly stopped the cab and there was a collision at that time between the automobile and the cab. She was the only witness who testified on this subject. Neither the driver of the cab nor of the automobile was called and there is no explanation. We think the question whether the taxi was being driven negligently was for the jury.

Plaintiff testified she was on her way to visit her mother at Fort Dodge, Iowa; she continued on her trip after the accident; that the taxi driver asked her if she wanted him to take her to a hospital but she said "No"; that she went to Fort Dodge to visit her mother who lived there, and about 2 weeks thereafter, returned to Chicago when on May 14, 1941, Cecil M. Commans, an investigator and adjuster for the General Transportation Casualty and Surety Company, and the Yellow Cab Company, called on plaintiff at her home and asked her how the accident occurred. He testified that he wrote on a blank statement what plaintiff said at the time, from which it appears that plaintiff repeated that the driver of the taxi was not to blame, and that all she wanted from the company was the payment





3.

of her doctor's bill of about \$15 which was incurred at Fort Dodge. She signed a full release and statement at the time and the adjuster gave her a check for \$15, made payable to her and to Leslie Hoppe, her husband. She further testified that about 3 or 4 days afterward she went to see the adjuster at his place of business, 309 W. Jackson Boulevard. The adjuster testified she came to see him about a week or 10 days after he gave her the check, etc. They both agree that she told him her husband did not want to endorse the check and that she, at the request of the adjuster, endorsed it and turned it over to the adjuster who gave her the \$15; that she turned around to leave the office and a few minutes thereafter, returned to the adjuster's desk and gave him the \$15, which he kept.

No complaint is made by counsel for defendant that there was any variance between the allegations of the complaint and the testimony of plaintiff as to how the accident occurred, nor is there any complaint about the ruling on the evidence or the instructions of the court, which are not abstracted. But counsel for defendant contend the court should have sustained defendant's motion for a directed verdict "at the close of all the evidence and for judgment notwithstanding the Verdict."

The court overruled the defendant's motion made at the close of plaintiff's evidence and afterward defendant put in its evidence. That motion was then out of the case. We spelled out the correct rule of procedure in such circumstances in Popadowski v. Bergaman, 304 Ill. App. 422. And since we think there was sufficient evidence on the question of defendant's negligence for the case to go to the jury it follows that the contentions made by counsel cannot be sustained. We are further of opinion we would not be warranted in holding that the verdict was against the manifest weight of the evidence. It was approved by the court and in these circumstances there was



of her doctor's bill of about \$15 which was incurred at Fort Dodge. She signed a full release and statement at the time and the adjuster gave her a check for \$15, and gave it to her and to Leslie Moore, her husband. The adjuster testified that about 3 or 4 days afterward she went to see the adjuster at his place of business, 309 E. Jackson Boulevard. The adjuster testified she came to see him about a week or 10 days after he gave her the check, etc. They both agree that he told him her husband did not want to endorse the check and that she, at the request of the adjuster, endorsed it and turned it over to the adjuster who gave her the \$15; that she turned around to leave the office and a few minutes thereafter, returned to the adjuster's desk and gave him the \$15, which he kept. No complaint is made by counsel for defendant that there was any variance between the allegations of the complaint and the testimony of plaintiff as to how the accident occurred, nor is there any complaint about the ruling on the evidence on the instructions of the court, which was not requested. But counsel for defendant contend the court should have sustained defendant's motion for a directed verdict at the close of all the evidence and the judgment notwithstanding the verdict. The court overruled the defendant's motion made at the close of plaintiff's evidence and allowed defendant out in the evidence. Their motion was then out of the case. He quoted out the correct rule of procedure in such circumstances in Torgerson v. Eastern, 306 Ill. App. 437. And since we think there was sufficient evidence on the question of defendant's negligence for the case to go to the jury it follows that the contention made by counsel cannot be sustained. We are further of opinion we would not be warranted in holding that the verdict was against the weight of the evidence. It was approved by the court and in those circumstances there was

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no error in this respect. Read v. Cummings, 324 Ill. App. 607.

Counsel for defendant further contend that since plaintiff executed a release of all her claims in consideration for the check for \$15, the verdict and judgment cannot stand. They say that the testimony of the adjuster and plaintiff clearly shows that she understood she was signing a release; that she was a woman of experience in the same line of business having been secretary, stenographer and bookkeeper and handled releases for an insurance company for many years and that her testimony, that she did not know she was signing a release, is not worthy of belief. There is considerable merit to this contention but upon a consideration of the entire record it appears without contradiction that the \$15 was returned and retained by the adjuster and we are unable to say that the judgment ought not to stand.

A further contention is that the judgment is excessive but we think there is no merit in this because the evidence is that plaintiff's leg was badly skinned; that she suffered considerable pain, called on the doctor at Fort Dodge 8 times and upon her return to Chicago was treated by Dr. John P. O'Connell May 16, 1941. He testified and described the injury to her left leg; that there was "an abraded area of about 2 1/2 inches in length and 3/4 to an inch in breadth which had an unhealthy scab, on removal of which there was evidence of infection. There was inflammation and swelling. I removed the unhealthy scab" and plaintiff was under his care until Labor Day; that from May to July 15 he saw her once or possibly twice a week; that "There is still a scar 2 inches in length and 3/4 or a half inch in breadth, which is positively permanent and adheres to the underlying tissues. \*\*\* that there is an impaired motion in the skin," etc., and that his charge was \$75.





5.

The judgment of the Superior court of Cook county  
is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and Niemeyer, J., concur.



The interest of the holder of the bond is

is defined

as follows

Interest is defined as the sum of the

Abstract

Gen. No. 10035

Agenda No. 11

In the Appellate Court of the  
State of Illinois  
Second District

May Term, A. D. 1945.

326 I.A. 686

Alfretta Dickinson,  
Plaintiff-Appellant,

v.

Rockford Van Orman Hotel Company,  
Defendant-Appellee.

Appeal from the  
Circuit Court of  
Winnebago County

Dove, P. J.

Appellant sued appellee in the circuit court of Winnebago County to recover damages for a fall allegedly caused by slipping on the marble stairway in the lobby of the hotel. The trial was by a jury, a motion by appellee for a directed verdict at the close of the plaintiff's case was denied, and ruling on a like motion at the close of all the testimony was reserved. The jury returned a verdict for \$7500.00 in favor of appellant, and judgment was entered on the verdict. On appellee's motion, the judgment was set aside, judgment notwithstanding the verdict was entered, appellee's motion for a new trial, pursuant to Rule 22 of our Supreme Court, was granted, and this appeal followed.

The cause was tried on allegations of common law negligence in not providing hand rails on the stairway and an adequate system of lighting thereof, and in maintaining the stairway in a smooth and slippery condition. Appellee denied any negligence in those respects, and alleged that appellant was wearing high heeled shoes and that the fall was caused by catching her heel on the edge of the landing.

Under Rule 22 of the Supreme Court, above mentioned, the





ruling on the motion for a new trial does not become effective unless and until the order granting the motion for judgment notwithstanding the verdict be reversed, vacated or set aside. Such a motion, like a motion for a directed verdict, presents only a question of law as to whether, when all of the evidence is considered, together with all reasonable inferences from it in its aspect most favorable to the plaintiff, there is a total failure or lack of evidence to prove any necessary element of the plaintiff's case. If there is any evidence tending to sustain every element of the plaintiff's case necessary to be proved to sustain the cause of action, it is immaterial upon which side the evidence is introduced. No contradictory evidence or other evidence of any kind or character will, in such case, justify a directed verdict or a judgment notwithstanding the verdict, except uncontradicted evidence of facts consistent with every fact which the evidence for the plaintiff tends to prove, but showing affirmatively a complete defense. If there is in the record evidence which, standing alone, tends to prove the material allegations of the complaint, a motion for a directed ~~material allegations~~ verdict, or for judgment notwithstanding the verdict, should be denied, even though, upon the entire record, the evidence may preponderate against the party in opposition to the motion, so that a verdict in his favor could not stand when tested by a motion for a new trial. (Merlo v. Public Service Company of Northern Illinois, 381 Ill. 300, 311-312.)

The uncontradicted facts shown by the evidence are as follows: Appellee had been operating the hotel since 1934. Appellant was a paying guest at a banquet of the Rockford Business and Professional Womens' Association on the evening of October 13, 1942, in the Crystal Room on the second or mezzanine floor of the hotel, and was injured by a fall on the stairway while coming downstairs after the banquet. The stairway is





on the north side of the lobby, and consists of 5 sections. Section 1 leads down from the mezzanine floor, at or near the entrance to the Crystal Room, to a landing on the north wall of the lobby, approximately 6 feet below the level of the mezzanine floor. From this landing, on down, the stairway is of the open type. Sections 2 and 3, each consisting of 12 and 14 steps, respectively, lead down from this landing at right angles, section 2 descending westerly, and section 3 easterly, each to another landing about 5 feet above the level of the lobby floor. Sections 4 and 5 each consist of 6 steps below the landings, respectively descending southerly at right angles from the last mentioned landings to the lobby floor, section 4 being to the west and section 5 to the east. The stairs and landings are constructed of marble, and the marble extends up about 4 feet on the north wall. The lowest flight of the steps is about  $5\frac{1}{4}$  feet wide, with steps between 8 and 9 inches high. There was a hand rail along the south side of each of the long flights and along the south side of the landing from which they lead down. The photographs in evidence show that there was a banister along the outside of each of the lower landings, with marble posts about 1 foot square at the south end, extending up about a foot above the banister. The lowest flights had marble banisters on each side, about 1 foot thick, with horizontal tops, the end nearest to the landing being about one foot above it, and the outer end about 6 feet above the lobby floor, with a cap along the top about an inch thick and extending about an inch over the sides. The lobby is a large room, and was lighted by 4 chandeliers, and a row of lights around the walls 3 or 4 feet from the ceiling.

Appellant was about 33 years old at the time of the accident, was 5 feet 5 inches tall, weighed 175 pounds, and had on shoes with leather soles and heels, and a street length



on the north side of the lobby, the entrance to the lobby, and  
from a landing down from the main floor, the entrance to the lobby, and  
entrance to the lobby, the entrance to the lobby, and the entrance to the lobby,  
the lobby, approximately 8 feet high, the entrance to the lobby, and the entrance to the lobby,  
floor, from this landing, the entrance to the lobby, and the entrance to the lobby,  
type, Sections 2 and 3, each consisting of 12 and 13 steps,  
respectively, lead down from the main floor to the lobby, and the entrance to the lobby,  
Section 2 descending westward, and Section 3 descending, each to  
another landing, about 5 feet high, the entrance to the lobby, and the entrance to the lobby,  
Section 4 and 5 each consist of 8 steps, the entrance to the lobby, and the entrance to the lobby,  
respectively, descending, each to a landing, the entrance to the lobby, and the entrance to the lobby,  
entrances leading to the lobby floor, each to a landing, the entrance to the lobby, and the entrance to the lobby,  
west and Section 3 to the west. The stairs and landings are  
constructed of marble, and the marble entrance to the lobby, and the entrance to the lobby,  
on the north wall. The lowest flight of the stairs is about  
5 feet wide, with steps between 2 and 3 inches high. There  
was a hand rail along the north side of the stairs,  
flights and along the south side of the landing, the entrance to the lobby, and the entrance to the lobby,  
lead down. The photograph is taken from the north side of the stairs, and the entrance to the lobby,  
passages along the stairs, and the entrance to the lobby, and the entrance to the lobby,  
marble steps, about 1 foot square at the north end, descending to  
about 1 foot above the entrance. The lowest flight is  
marble steps, on each side, about 1 foot high, and the entrance to the lobby, and the entrance to the lobby,  
horizontal bars, the end nearest to the stairs, about 1 foot  
foot square, and the stairs, about 1 foot high, and the entrance to the lobby, and the entrance to the lobby,  
floor, with a carpet, and the stairs, about 1 foot high, and the entrance to the lobby, and the entrance to the lobby,  
landing, about 1 foot high, and the stairs, about 1 foot high, and the entrance to the lobby, and the entrance to the lobby,  
room, and the stairs, about 1 foot high, and the stairs, about 1 foot high, and the entrance to the lobby, and the entrance to the lobby,  
around the walls 2 to 3 feet from the ceiling.  
Appliances and about 12 years old, the entrance to the lobby, and the entrance to the lobby,  
appliance, was 1 foot 6 inches high, and the entrance to the lobby, and the entrance to the lobby,  
led on floor with leather shoes and heels, and a small rug.

dress 16 inches from the floor. After the banquet, in company with others, she went down the first section of the stairway, turned left and went down the north side of the west section of the long flight, and after reaching the second landing, proceeded south along and about a foot from the west side thereof, to the top of the last flight leading down to the lobby. As she started down this last flight, she fell and landed on the floor of the lobby.

She testified that as she came down the stairs, the marble sides and stairs were very shiny and slick, and there was a certain glare, caused by the light; that she had just taken her foot down to the first step below the landing, which would be on the right side, when she slipped, reaching to the right for something to save herself, because she was nearest to the right wall, put her hand on the projection which extends south from the landing on the west side of that flight of stairs, but was not able to hold onto that side and that there was no railing there; that she could not say exactly where the top of the partition that is on the west side of the steps came on her body, but that she would have to bend over to touch it, and that it was below the ends of her finger tips as they would be at her side; that after she fell, the next thing she knew was when she came to on the floor of the lobby; that the heels of her shoes were of average height, not higher than 2 1/2 inches; that just before she fell she had proceeded down the stairs slowly; that at the time she stepped down onto the first step where she fell she had been facing south and was looking straight down at the stairs. On cross examination she testified that no one was ahead of her; that when she came to the stairway leading down to the lobby she noticed that the steps were very glaring and slippery; that before leaving the



... 16 inches from the floor. After the witness, in company  
with others, and down in front section of the building,  
turned left and went down the north side of the west section  
of the long flight, and after reaching the second landing, pro-  
ceeded south along and about a foot from the west wall, and  
to the top of the last flight landing down to the lobby. As she  
started down this last flight, she fell and landed on the floor  
of the lobby.

The testimony that she gave about the accident, the  
curb side and stairs were very dark and slick, and there was  
a certain glare, caused by the light; that she had just taken her  
foot down to the first step below the landing, which would be on  
the right side, when she slipped, meaning to the right for  
something to save herself, because she was nervous to the right  
wall, and her hand on the handrail which extends south from  
the landing in the west side of the flight of stairs, but she  
was able to hold onto that side and that there was no railing  
there; that she could not say exactly where the top of the  
partition was on the west side of the stairs, but she was on her  
body, but that she would have to bend over to reach it, and  
that it was below the end of her fingers when she fell would  
be at her side; that after she fell, she went down the stairs  
and when she came to on the floor of the lobby, that the walls  
of the lobby were of various heights, and higher than 16  
feet; that just before she fell she had proceeded down the  
stairs slowly; that at the time she slipped down onto the  
first step where she fell she had been looking down and was  
looking straight down at the stairs. In cross examination she  
testified that no one was ahead of her; that when she came to  
the stairway leading down to the lobby she noticed that the  
steps were very slippery and slippery; that before leaving the

mezzanine floor she went to the elevator, but there was a crowd around there, and that she felt that she was younger and there were older people who could take the elevator and that she started down the stairs; that she first noticed the glary, and slippery condition when she was on the long flight of stairs and had come down the first 4 or 5 steps on the right side, which would be the north wall, where there was no railing on that side, and when she noticed that the steps were glary and slippery she went slowly; that she noticed the railing on the other side of the long flight at that time; that at the time she slipped she was not more than a foot from the west wall; that <sup>as</sup> her foot slipped forward, she reached for something to save herself, and nothing being there she pitched forward, and did not know what position she came down in, and when she came to she was stretched out on the floor at the bottom of the stairs; that there was a large light fixture hanging from the lobby, the type of glass of which she did not know, floor lamps in the lobby and lights at the room clerk's section and at the desk; and that she did not recall any lights around the lobby 4 or 5 feet from the ceiling. On being recalled in her own behalf she testified that she had not been in the hotel since some time in 1941, and did not know whether she had used the stairs on that occasion, but her best recollection was that she had not, and that prior thereto she had not been in the hotel since 1940.

Appellant's aunt, one of the persons present at the banquet, testified that she and many of the others went down the stairs; that appellant was one or two steps ahead of her, and both were walking very slowly; that as she stepped down from the middle landing there was a glare of lights, and just as appellant stepped off the landing onto the next step her feet seemed to slip from under her, and described appellant's



...the floor the way to the elevator, but when she  
stood around there, and that was the last time she  
there were other people in the elevator and that  
she started down the stairs; that she then noticed the design  
and slippery condition when she was on the lower flight of  
stairs and had come down the stairs to the lower flight  
side, which would be the lower side. She then came to a  
on that side, and when she noticed that the steps were slippery  
and slippery she went slowly; and she noticed the walking on  
the upper side of the lower flight at that time; that is, she  
then she slipped and was not down the stairs from that point;  
that she had slipped forward. She noticed the walking on the  
downward, and not the other side and placed herself, and that  
not know what position she was down in, and then she came to  
she was stretched out on the floor in the middle of the stairs;  
that there was a light light in the middle of the stairs, and  
type of glass of which she did not know, that is, in the  
lobby and lights at the time she was on the stairs;  
and that she did not recall any lights around the lobby; and  
feet from the ceiling. She was walking in the lobby and  
testified that she had not seen in the lobby since she was in  
1941, and did not know whether she had seen the lights or not;  
and that, but her best recollection was that she had not, and  
that prior thereto she had not been in the lobby since 1941.  
Appellant's point, one of the witnesses present at the  
hearing, testified that she had seen all the lights when down  
the stairs; that appellant was one of the people present at the  
and both were walking very slowly; that in the design given  
from the middle landing there was a light in the lobby, and  
just as appellant stepped off the landing onto the lower stairs  
her feet seemed to slip from under her, and appellant's

fall substantially the same as appellant, saying that she pitched headlong down the stairs; that her feet went from under her and she went forward; that the surface of the extensions on each side of the stairs were very glossy and white and slippery, and the stairs were of the same material and were very glossy and glary. On cross examination she said that the first thing she noticed about the accident was that appellant's right foot slid forward; that there was a glare from the ceiling of the lobby; and that appellant's heel was less than 2 inches high.

Three other ladies who attended the banquet and came down the stairs, testified that the steps were slick, and glary from the lights in the lobby, and that the condition existed all the way down the stairs. One of them testified that the steps were smooth and highly polished; that she knew the difference between polished and unpolished marble, and that the steps were polished, and very glary, and made it hard to know how to step - to watch very carefully. She and appellant's aunt each testified to having previously been there several times, and that the conditions were the same, the aunt stating that the condition had existed more than a year.

Briefly summarized, the testimony of these five witnesses, including appellant, is to the effect that the steps and walls of the stairway were very smooth and slippery, and that there was a glare of light on them from the lobby lights, which conditions had existed more than a year, and made it difficult to know how to step, and necessary to watch carefully; that on that account appellant was proceeding very slowly and slipped on one of the steps, reached for something to save herself, but there was no hand rail, and she fell down the stairs. Under the above testimony, standing alone, and considered in its aspect most favorable to appellant, without considering any contradictory evidence, we do not think that





as a matter of law there was a total failure of any evidence tending to prove the two necessary elements of ordinary care on her part and negligence on the part of the defendant. Under the rule in the Merlo case, supra, we are of the opinion that it was error to grant the motion for judgment notwithstanding the verdict; and the judgment notwithstanding the verdict is accordingly reversed. (Thomas v. Buchanan, 357 Ill. 270, 278; Reed v. Lyford, 311 Ill. App. 486; Miller v. Russell, 302 Ill. App. 165).

This calls for a consideration of the granting of appellee's motion for a new trial, three of the grounds of which are: that appellant was guilty of contributory negligence; that the verdict is against the manifest weight of the evidence, and that the court erred in the giving of instructions, all of which were sustained by the trial court, and are urged here by appellee. On considering the granting of the motion for a new trial, we may consider contradictory evidence, weigh the evidences, and inquire into its preponderance, as indicated in the Merlo case, supra, and, of course, consider the errors urged to the instructions to the jury.

As to the question of contributory negligence, appellant testified that she saw the alleged slippery condition of the stairs and the alleged glare of the lights when she started down the first few steps of the long flight, and three of her witnesses testified that those conditions existed all the way down the stairway. The law charges a person with the duty of seeing that which is clearly visible and within the range of vision. (Reed v. Lyford, 311 Ill. App. 486). She also testified that she noticed the hand rail on the south side of the long flight. Nevertheless, she proceeded down the north side thereof, where there was no hand rail, and proceeded to the place where she fell, wearing shoes which her own testimony indicates had leather heels about 2 1/2 inches high. No reason is apparent or





suggested why she did not cross over to the south side and use the hand rail there. While she did not fall on that flight, ordinary care under the conditions which she claims existed, would dictate that she use the hand rail. She further testified that when she reached the landing and was about to take her step down to the last flight she realized that there was no protection there, other than the solid wall, evidently meaning the marble banister on the west side of the last flight. Where one has knowledge of a dangerous condition, he cannot rely upon a presumption that the place is safe, as he could where he had no such knowledge. (City of East Dubuque v. Burhyte, 173 Ill. 553, 558; City of Spring Valley v. Gavin, 182 Ill. 232.) Cases where the plaintiff had no knowledge of a dangerous condition have no application here. The ordinary care required from appellant under the circumstances shown was care commensurate with the danger of which she knew. (City Water Works v. Lane, 122 Ill. App. 427; City of Flora, for use, etc., v. Bryden, 300 Ill. App. 1; City of Spring Valley v. Gavin, 81 Ill. App. 456.)

Appellee's special service officer testified that just before appellant fell she was walking just the same as anyone else would, down the stairs, and that when she stepped down from the landing, her heel caught; that the heel slipped down onto the edge of the landing, and then she stumbled or tripped; that she put her hand out to recover herself and fell forward down the stairs; and that from the point where she started to fall, (which would be the landing) the banister was considerably lower than her hips, and to reach for it she would have to lean down somewhat. Appellant and her aunt also testified that she fell forward. Although appellant was recalled as a witness, we find no place in the abstract where she denied that her heel caught. As suggested by appellee, the law of physics indicates that if a person's foot slips on a smooth surface, while going forward, the result would be that the





person would fall backward, but if her heel caught on a step, it would tend to throw her forward. It is to be observed that reaching for the banister is not shown to be the cause of appellant's leaning forward, because she reached for it after she started to fall. No reason is suggested why she could not have taken hold of the post at the south west corner of the landing when she started to step down onto the step below.

On the question of the alleged negligence of appellee, its special service officer testified that there were light fixtures hanging from the ceiling of the lobby, with metal places in the fixtures at intervals that cannot be seen through, the glass portion being of frosted glass, and that the fixtures contained no clear glass; that there was a row of lights around the lobby wall 3 or 4 feet below the ceiling, with 40 watt frosted glass bulbs of a reddish or sun tint; that the steps were dusty at the time of the accident, but were washed each night with a cleansing soap and water; and that there was no effect of the lights on the steps except lighting them. It is not claimed by appellant that there was any foreign substance on them at the time she fell, which might have contributed to the fall.

The night clerk of the hotel testified that the steps were of a light brown color, and that he did not notice any effect of the lights on them. Another witness, whose office had been on the ground floor of the hotel for 7 years, testified the steps were of a buff color; that he had gone up and down the stairs many times after dark when the lights were on, and had never noticed anything particularly different between the night and the day lighting; that the stairs had a honed finish, and not a polished surface like the sides of the hotel. While he said he did not know anything about the condition of the stairs





on the night of the accident, other testimony in the record shows that their condition was the same as it had been for a long time previously, and at the time of the trial. A monument dealer, of 24 years experience, testified that he examined the steps; that they were of a honed finish, and that polished marble is the slickest type. One of appellant's witnesses above mentioned, testified that the lights were on in the lobby but they were rather dim.

Under the rule in the *Merlo* case, supra, the testimony found in the record required the trial court to submit the issues in this case to the jury, but in our opinion the preponderance of the evidence shows that appellant's fall was caused by her heel catching on the edge of the landing, and that at the time of and just before the accident, she was not exercising that degree of ordinary care required of her by the circumstances which she claims existed. The preponderance of the evidence also shows that the steps were not dangerously slippery and that the lobby lights did not make a glare which contributed to appellant's fall. The trial court correctly held that the verdict was against the manifest weight of the evidence on the issues of due care on the part of appellant, and negligence on the part of appellee.

The sixth instruction given is based on liability because of no hand rails, balustrades or guards were on either side of the section of the stairs where plaintiff fell. The testimony on both sides shows, without any contradiction, that there were marble balustrades there, and the issue was only as to their availability or efficiency. The instruction should not have been given.

The eighth instruction is to the effect that if the hotel was not provided with an adequate system of lighting, and





if the failure to provide the stairway with adequate lighting was negligence, that then the jury should find the defendant guilty. The real complaint of appellant is that the lighting was too strong, and caused a glare or reflection on the stairs. Jurors do not have an opportunity to examine dictionaries for definitions of terms used in instructions, and ordinarily would consider the language used as referring to an insufficient light. The instruction directs a verdict and is not cured by other given instructions. It should have more clearly defined the issue on the question. Appellant's claim that appellee waived criticism of the instruction, because its 11th instruction is subject to a similar vice, is untenable.

Because of our conclusions it is unnecessary to discuss other matters urged by appellee. The order granting a new trial is affirmed, and the cause is remanded.

Judgment notwithstanding the verdict reversed.

Order granting new trial affirmed and cause remanded.



It is the duty of the State to protect the rights of its citizens  
and to maintain the public order. The State is responsible for the  
welfare of its people and for the preservation of its territory.  
The State is the guardian of the rights of its citizens and  
the protector of its interests. The State is the source of  
the law and the enforcer of the law. The State is the  
organ of the people and the representative of the people.  
The State is the embodiment of the will of the people and  
the expression of the common good. The State is the  
foundation of the society and the basis of the nation.  
The State is the pillar of the civilization and the  
cornerstone of the progress. The State is the  
guardian of the peace and the promoter of the  
unity. The State is the protector of the  
freedom and the defender of the  
justice. The State is the  
organ of the power and the  
instrument of the action.

The State is the entity that has the authority to make laws and to enforce them. It is the entity that has the power to raise taxes and to spend them for the public good. It is the entity that has the responsibility to protect the rights of its citizens and to maintain the public order. The State is the entity that has the duty to provide for the welfare of its people and to preserve its territory. The State is the entity that has the honor to represent the people and to express the common good. The State is the entity that has the power to create the civilization and to promote the progress. The State is the entity that has the duty to maintain the peace and to promote the unity. The State is the entity that has the responsibility to protect the freedom and to defend the justice. The State is the entity that has the power to organize the society and to act as the instrument of the action.

321  
NO. 10025

Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

*February*  
MAY TERM, A. D. 1945

A  
1983

JESSE L. STRAUSS,

Appellant,

vs.

CORNELIUS SMYTH, et al.,

On appeal of

JESSE L. STRAUSS,

Appellant

326 I.A. 6871  
Appeal from  
Circuit Court  
Du Page County

Honorable  
William G. Knoch,  
Judge Presiding

~~Mr. Justice Bristow delivered the Opinion of the Court.~~

Appellant signed a note dated August 20, 1926. Time of payment of the note was extended several times by agreement. A proceeding in Attachment and Garnishment was instituted August 4, 1943. This was admitted to be 9 to 10 months after the expiration of 10 years after the date the action accrued.

The Defendants relied upon the ten year Statute of Limitations. To this defense the Plaintiff replied that the Defendants had resided out of the State of Illinois for such time that on the date this action was instituted, the ten year period had not elapsed.

The Circuit Court entered judgment, finding the issue for the Defendants and discharged the garnishee. From this judgment, appeal has been taken to this court.

The only point in controversy is whether the running of the ten years Statute of Limitations was tolled because the Defendants had departed from and resided out of the State after the cause of action had accrued. The



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\* Handwritten note: The above is not a true statement.

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the Department will be advised of the results.

State of Illinois - For and to the use of the State of Illinois, the following is a list of the names of the persons who have been appointed to the office of Justice of the Peace in the County of Cook, Illinois, for the term ending on the 31st day of December, 1900.

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Statute of Illinois entitled Limitations, Ch. 85, Sec. 19, provides "The time of his absence is not part of the time limited for the commencement of the action." Loebell vs. Williams, 255 Ill. App. 489,490.

Both parties cite and rely upon the case of Pells vs. Snell, 130 Ill. 379. This case, in construing the meaning of the word "reside," which was introduced into this Limitation Statute by the Act of 1872, defined the meaning of the word in the following language, at page 384-385: "There seems however to be a substantial agreement that residence means a fixed and permanent abode or dwelling-place, at least for the time being, as contradistinguished from a mere temporary locality of existence \*\*\* We would not be understood as adopting the doctrine \*\*\* to the extent of holding that there must be an actual change of the party's domicile, in the strict legal sense of that word, \*\*\* all we intend to hold being, that he must acquire a fixed and permanent abode or dwelling place out of this State, at least for the time being."

Appellees cite one other case, only, viz: Gilbert's Estate, 311 Ill. App. 28. The Gilbert's Estate case is in regard to a claim for a child's award under the Administration Act. The Appellate Court, there, at page 36, held that in considering the application for an award, the meaning intended by the Administration Act of "residing" is to be interpreted by the strict legal concept of the word "domicile." The holding of the Supreme Court, however, in the case of Pells vs. Snell, Supra, is that strict proof of domicile without the State is not required to be made, to establish that a defendant "Resided out of the State," under the Limitation Act.

The evidence introduced on the trial is quite meager. It consisted of a letter; an unemployment compensation card; written extensions of maturity dates of the note; stipulations in regard to a foreclosure proceeding of a mortgage securing the note as non-residents with addresses at 747 N. E. 1st Street, Miami, Florida, in which foreclosure there was a deficiency judgment in rem; and brief testimony of Cornelius M. Smyth, as an adverse witness.



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by the Administration Act of "residing" in the territory of the United States.

never, in the case of John W. Smith, who, in fact, was not of one  
level except of the very "colored" level, as the title of the "New York

— I find that the "State of Georgia" is not mentioned in the title of the book, but that the "State of Georgia" is mentioned in the title of the book.

the evaluation programme on the basis of the results.

of a letter to Washington dated July 18, 1960, from the  
State Department to the Attorney General, which was

Street, Miami, Florida, in which telephone number and a building number.

and did not testify to anything . . .

Questions and answers in the examination of Smyth were as follows:

"Where do you live?" "I live at 2252 Washington Blvd., Chicago, Illinois."

"How long have you lived there?" "I lived there since last November."

"Where did you live before that?" "Before that I lived down in Virginia."

"How long did you live in Virginia?" "About a year and a half." "Whereabouts in Virginia were you?" "Around Portsmouth."

The witness further testified that he was in Florida first, around '38; that he was a mechanic and there was no work in that line; that his wife did a little laundry work; and that 147 First Street was his wife's address. When asked in regard to the letter, he testified he did not write or sign it, and did not know his wife's handwriting. When pressed several times as to whether he had ordered or authorized the letter sent to Mr. Greenebaum, he said "I have no recollection of signing that letter, that is my card." And again pressed with the question, "And you didn't order it written or authorize anybody to write it or to send this?", referring to the card, he evaded the question and answered, "That is my card." He said he went to Florida again around the beginning of '40; that he got no work, that his wife did a little, that she was sick and that it was too hot for her in Portsmouth. The witness was then asked, "Where did you move from, to go to Portsmouth?" He answered, "I moved from here and went down to Miami." He said that was in '42. He was next asked "How long did you stay in Miami?" He replied, "I didn't stay in Miami, I went to Portsmouth." He stated that before going to Portsmouth, he was in Miami probably a month or six weeks.

The unemployment card shows several payments in 1939. The letter was addressed to Mr. Greenebaum in reply to a letter concerning the real estate described in the mortgage. The letter stated the property had always been an expense and worry, that the few dollars received from rents may have kept the writer and his wife from charity. It said, "I enclose one of my cards where I received 7.50 per week while in Chic last year. If you can collect 1000 on that kind of income O.K."





It impresses us that if the witness had not authorized that letter to be written, he was obligated to so state instead of evasively answering. The above is all the material part of his testimony. The inquiry ~~being~~ made of him was whether he had departed from this State and resided outside of this State. The witness had lived in Chicago since November after the attachment suit had been instituted. Before his return to Chicago he stated that he had "lived" in Portsmouth, Virginia, for a year and a half, moving there from Chicago, and went down to Miami in 1942, and after a month or six weeks went to Portsmouth, where he stated he had lived for one and one-half years.

The word "live" is defined in various Webster's dictionaries as to reside, dwell, abide, stay, as to live in a foreign land. If a person is asked where he lives, that, in common parlance, is asking him where he resides. If a person intends to impart the fact that he went from Chicago to Miami for a temporary sojourn, he would not say that he "moved" from Chicago to Miami and from there to Portsmouth. In common parlance to "move" is to make a change of residence. Ordinary language is to be understood in its plain ordinary meaning. If a person intended to indicate that he was temporarily down in Virginia, he would not answer: Before that I lived down in Virginia about a year and a half. In answering that he had moved from Florida to Portsmouth, and had lived in Portsmouth for a year and a half, the implication can only be that the residence there was a fixed permanent abode or dwelling place, for at least the time being, which in this case was for a year and a half.

When the above testimony is considered in light of the holding in the case of Pells vs. Snell Supra, we are compelled to hold that the Statute of Limitations was tolled for such a length of time that Plaintiff's <sup>cause</sup> ~~course~~ of action was not barred.



It appears that if the witness had not testified that latter

to be witness, he was obliged to do this in order of evidence.

The above is all the material part of his testimony. The inquiry

of him was whether he had departed from this State and resided outside of

this State. The witness had lived in Chicago since November 1891, and

had since then resided in Chicago. He stated that he had lived in

he had "lived" in Portsmouth, Virginia, for a year and a half, moving there

from Chicago, and went down to Miami in 1904, and lived a month or six weeks

in the Portsmouth, where he stated he had lived for one and one-half years.

The word "lived" is defined in various Webster's dictionaries as

to reside, dwell, abide, stay, as to live in a house, land. It is common

to say that one lives, that, in common parlance, is saying that one

resides. If a person intends to report the fact that he went from Chicago

to Miami for a temporary sojourn, it would not be true to say, "I went

ago to Miami and from there to Portsmouth." In common parlance to "go" is

to make a short or residence. Ordinary language is to be understood in its

plain ordinary meaning. If a person travels to Miami and lives there

partly down in Virginia, he would not answer before that he lived there in

Virginia about a year and a half. In answering that he had lived there

Florida to Portsmouth, and he lived in Portsmouth for a year and a half, the

implication can only be that the residence there was a fixed permanent one

in dwelling place, for at least one year. When in this case was for a

year and a half.

When the above testimony is considered in light of the fact that in

the case of *Fells vs. Shell* (1904), it was established to hold that the

of limitations was tolled for such a length of time that the statute of

limitations

of action was not barred.

It follows that the trial court erred in finding the issues for the Defendants, and in discharging the garnishee. This case should be and is reversed, with directions to the trial court to find the issues for the Plaintiff; to enter proper judgment for Plaintiff; reinstate the garnishee, and to proceed in compliance with the Attachment and Garnishment Act.

Reversed and Remanded with Directions.



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Abstract

326 I.A. 687

Gen. No. 10034.

Agenda No. 10.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
MAY TERM, A. D. 1945.

ANNA L. BARNES, JAMES T. GILRUTH,  
MAGGIE A. HARRAH, HANNAH H.  
MULLEN, KATE GILRUTH LUDWIG,  
RUTH E. MCKENZIE, JOHN MCKENZIE,  
Jr., DONALD D. MCKENZIE and  
HARRIET E. TILDEN,

Plaintiffs-Appellants,

vs.

THE ILLINOIS NATIONAL BANK &  
TRUST CO. OF ROCKFORD, as Trustee,  
a Corporation, ALBERT G. GILRUTH,  
MAURICE T. GILRUTH, LAURA VOLSTEAD  
LOMEN, HARRIET K. STUCKEY, VERA T.  
SHANKLAND, ANITA J. KANNAUGH, CHARLES  
F. ROOD, and CONSTANCE FISHER GIBSON,  
Defendants-Appellees.

Appeal from  
Circuit Court  
Winnebago County.

WOLFE,-- J.

Andrew Gilruth and his wife, Elsie F. Gilruth, created a trust, the income derived therefrom was to be paid to them during lifetime, and at their death to be distributed to certain designated persons. Later the trust agreement was amended. The donors were to receive the income the same as provided in the original trust agreement, and at the death of the survivor of the donors, the proceeds were to be distributed to certain nephews and nieces of the donors. Andrew Gilruth died Jan. 3, 1944, and his wife, Elsie F. Gilruth, died Feb. 25, 1944.



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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission is therefore unable to determine whether the CLPS is a legitimate organization or a subversive one.

442

2.

A dispute arose as to how the trust funds should be distributed. The plaintiff, Anna L. Barnes and eight others, filed their bill in equity in the Circuit Court of Winnebago County, against eight other nephews and nieces for the construction of the amendment to the trust agreement. The plaintiffs claimed the personal property, (worth about seventy thousand dollars,) should be distributed among the nephews and nieces per capita, under the terms of the said amendment, thereby giving to each of the seventeen nieces and nephews an undivided one-seventeenth interest in the estate. The defendants claimed a division per stirpes, giving them from one-eighth to one-sixteenth of the property, depending upon the number of children of certain named brothers and sisters. The trial court declared that the proper interpretation of the clause of the trust in question, provided for a per stirpes division and entered a decree accordingly. It is from this decree that an appeal has been prosecuted.

The trust agreement provides that after the death of the donors, all funeral expenses etc., taxes and costs of administration of the trust shall be fully paid, and then continues: "(b) And the remainder of said trust estate shall be distributed in equal parts between them unto such of the following nephews, nieces and grandnieces of the Donors as shall be living at the time of the death of the survivor of said Donors, to-wit:

"The children of Peter Gilruth a deceased brother of said Donor Andrew Gilruth.





3.

"The children of Alexander C. Gilruth, brother of said Donor Andrew Gilruth.

"The children of Kate Gilruth McKenzie a deceased sister of said Donor Andrew Gilruth.

"The children of William O. Gilruth, brother of said Donor Andrew Gilruth.

"The daughter of Helen Gilruth Volstead a deceased sister of said Donor Andrew Gilruth.

"The children of Lawrence Gilruth, brother of said Donor Andrew Gilruth.

"The daughter and granddaughters of Alice F. Kosier a sister of said Donor Elsie F. Gilruth to-wit: Harriet Stuckey, Louise Stuckey and Constance Belle Stuckey.

"The children of Ella F. Tinker a sister of said Donor Elsie F. Gilruth.

"The son and granddaughter of Mary F. Rood a sister of said Donor Elsie F. Gilruth to-wit: Charles Rood and Dorothy Josephine Hecker.

"The daughter of Arthur E. Fisher a brother of said Donor Elsie F. Gilruth to-wit: Constance Fisher Gibson."

The sole question presented on this appeal is the proper construction to be given to the first paragraph of Section b of the trust agreement. There is no hard and fast rule that the Court can use in construing this agreement, but we must give it the construction that <sup>is</sup> intended by the language used, by the donors at the time the trust agreement was created.



The subject of this paper is the question of the  
effect of the various factors which enter into the  
determination of the rate of interest. It is a question  
of great importance, and one which has attracted the  
attention of many of the leading economists of the  
world. The subject is treated in a very comprehensive  
manner, and the author gives a very full and complete  
account of the various theories which have been advanced  
to explain the phenomenon. The author also gives a  
very full and complete account of the various facts  
which bear upon the question, and shows how these  
facts are in accordance with the various theories.  
The author also gives a very full and complete  
account of the various methods which have been used  
to determine the rate of interest, and shows how  
these methods are in accordance with the various  
theories. The author also gives a very full and  
complete account of the various results which have  
been obtained by the various methods, and shows how  
these results are in accordance with the various  
theories. The author also gives a very full and  
complete account of the various conclusions which have  
been reached by the various methods, and shows how  
these conclusions are in accordance with the various  
theories. The author also gives a very full and  
complete account of the various suggestions which have  
been made for the determination of the rate of  
interest, and shows how these suggestions are in  
accordance with the various theories.

4.

This Court, in the case of the First National Bank of Chicago vs. Cherrier, reported in 311 Ill. App., 214 reviewed many cases relative to the construction of a will containing similar language to this trust agreement. The rule in construing written instruments or trust agreements is the same as is in wills. We must give each and every part of the language used, its usual and customary meaning. It will be observed that the language used is that the trust estate, "shall be distributed in equal parts between them unto such of the following nephews, nieces and grandnieces of the donors." A review of the numerous cases cited by both appellants and appellees would serve no useful purpose, as most of them have been commented on by this Court in the case of First National Bank vs. Cherrier, supra. We had a similar question presented to us in Johnson vs. Johnson, 317 Ill. App. 91, and we held under the language used in these two cases, that it was the intention of the testator to have a per capita rather than a per stirpes distribution.

It is our conclusion that the language used in this trust agreement indicated that the donors intended a per capita distribution among the nephews, nieces and grandnieces and not as per stirpes. Therefore, the decree of the trial court is hereby reversed, and the cause remanded.

Reversed and cause remanded.





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